Vol. VII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 603

L. P. LARSON, JR., COMPANY, PETITIONER,

vs.

WM. WRIGLEY, JR., COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1927

CERTIORARI GRANTED DECEMBER 5, 1927

(33,055)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No.

L. P. LARSON, JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY, JR. COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

CHARLES H. ALDRICH ESQ.,
GEORGE I. HAIGHT ESQ.,
CHESTER D. KERN ESQ.,
RALPH L. PECK ESQ.,
Counsel for Petitioner.

ISAAC H. MAYER ESQ.,
WALLACE R. LANE ESQ.,
Counsel for Respondent.

J51567

INDEX.

Index to record in United States District Court..... i
Clerk's certificate to volumes 1 to 7 inclusive.....3505a
Clerk's certificate to volumes 8 to 10 inclusive.....4493
Record in United States Circuit Court of Appeals in cause No. 3727, L. P. Larson, Jr. Company vs. Wm. Wrigley, Jr. Company:
Placita.....4495
Clerk's certificate to exhibits, filed February 27, 1926.....4495
Notice in re printing exhibits, filed March 15, 1926..4496
Stipulation, filed March 23, 1926, in re preparing and printing record.....4497
Order of March 20, 1925, of District Judge fixing time for filing praecipe, etc., filed March 23, 1926..4500
Order of March 23, 1926, approving stipulation filed March 23, 1926, and order of District Judge of March 20, 1925.....4502
Certificate of clerk of District Court to transcript of evidence and exhibits before the Master, filed March 24, 1926.....4502
Order of April 9, 1926, permitting the withdrawal of certain exhibits.....4503
Certificate of clerk of District Court to Vol. XVI of exhibits, filed April 12, 1926.....4504
Notice of motion to speed printing of record, consolidating causes for hearing, etc., filed April 22, 1926.....4505
Stipulation in re printing of record and avoiding duplication, filed May 12, 1926.....4506

Stipulation making corrections in narrative form of evidence, filed June 2, 1926.....4507
Appearance of counsel for Wm. Wrigley, Jr. Company, filed July 16, 1926.....4509
Order of July 23, 1926, extending time for appellee to file briefs and placing cause on calendar.....4510
Order of August 9, 1926, granting leave to withdraw Vol. III of Master's Report 4511
Appearance of counsel for L. P. Larson, Jr. Company, filed August 25, 1926.....4511
Order of October 5, 1926, setting cause for hearing..4512
Order of October 21, 1926, extending time for filing briefs 4513
Appearance of counsel for Wm. Wrigley, Jr. Company, filed October 27, 1926.....4513
Appearance of counsel for L. P. Larson, Jr. Company, filed October 23, 1926.....4514
Hearing, November 12, 1926.....4515
Opinion, filed April 2, 1927.....4516
Judgment entered April 2, 1927.....4529
Petition for rehearing on behalf of L. P. Larson, Jr. Company filed April 21, 1927.....4529
Proof of service, filed April 21, 1927.....4530
Petition for rehearing on behalf of Wm. Wrigley Jr. Company filed April 21, 1927.....4531
Proof of service, filed April 21, 1927.....4531
Answer of Wm. Wrigley, Jr. Company to petition for rehearing filed May 2, 1927.....4532
Answer of L. P. Larson, Jr. Company to petition for rehearing filed May 2, 1927.....4532
Notice of filing brief in answer to petition for rehearing of the Wm. Wrigley, Jr. Company, filed May 2, 1927 4533
Order of August 30, 1927, denying petition for rehearing 4534

Order of August 31, 1927, staying mandate.....4535
Certificate of Clerk 4537
Record in United States Circuit Court of Appeals in cause No. 3728, Wm. Wrigley, Jr. Company vs. L. P. Larson, Jr. Company:
Placita 4539
Hearing, November 12, 1926.....4539
Opinion filed April 2, 1927.....4540
Judgment entered April 2, 1927.....4540
Petition for rehearing on behalf of L. P. Larson Jr. Company, filed April 21, 1927.....4541
Petition for rehearing on behalf of Wm. Wrigley, Jr. Company filed April 21, 1927.....4541
Answer of L. P. Larson Jr. Company to petition for rehearing, filed May 2, 1927.....4541
Answer of Wm. Wrigley, Jr. Company to petition for rehearing, filed May 2, 1927.....4541
Order of August 30, 1927, denying petitions for rehearing 4542
Clerk's certificate 4543

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1925.

No. 3727

L. P. LARSON, JR., COMPANY,

Appellant,

vs.

WM. WRIGLEY, JR., COMPANY,

Appellee.

No. 3728

WM. WRIGLEY, JR., COMPANY,

Appellant,

vs.

L. P. LARSON, JR., COMPANY,

Appellee.

MR. CHARLES H. ALDRICH,
Counsel for L. P. Larson, Jr., Co.

MR. ISAAC H. MAYER,
MR. WALLACE R. LANE,
Counsel for Wm. Wrigley, Jr., Co.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

Placita 1
Bill of complaint, filed Oct. 27, 1911, in Case No. 30,563.. 2
Photograph of cover and sides of complainant's product 13
Photograph of Wrigley five-stick package Spearmint gum and counterband 15
Photograph cover and sides Peptomint box..... 17
Affidavit of Frank E. Tuttle..... 19
Photograph of Larson Peptomint package and counterband 20
Affidavit of J. C. Cox..... 21
Affidavit of Gerald Hayes..... 22
Affidavit of J. A. Williams.....24, 23
Rule to show cause why injunction pendente lite should not issue against defendants, No. 30,563..... 24
Affidavit of James R. Offield..... 25
Letter, Oct. 20, 1911, Secretary of State to Offield.. 26
Affidavit of James R. Offield..... 27
Decree of Aug. 8, 1910, in case of Wm. Wrigley Jr. Co. vs. The Grove Co..... 27
Answer of defendants filed Nov. 6, 1911..... 29
Order of Nov. 8, 1911, taking motion for preliminary injunction under advisement, No. 488..... 37
Order of Nov. 20, 1911, that complainant file injunction bond, No. 30,563 37
Preliminary injunction order entered Nov. 20, 1911, No. 30,563 38
Motion for preliminary injunction, No. 30,563..... 39

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Amended answer of defendants filed Apr. 18, 1914, in No. 30,563 42
Wrigley Spearmint counterband used prior to 1907.. 50
Wrigley Spearmint counterband as changed in 1907. 51
Wrigley Spearmint counterband used in 1907..... 52
Wrapper for Wrigley Spearmint gum, 1907..... 53
Wrigley Spearmint counterband of 1914..... 54
Ping wrapper for individual stick of Wrigley Spearmint gum 55
Pink wrapper for Wrigley Spearmint gum, 1914.... 56
Order substituting attorneys for defendants..... 57
Order granting defendants leave to file amended answer instanter, No. 30,563..... 57
Notice filed Apr. 18, 1914..... 57
Affidavit of L. P. Larson, Jr., No. 30,563..... 59
Notice of taking depositions, No. 30,563..... 62
Bill of complaint filed June 15, 1915, No. 488..... 63
Photograph, Wintermint box showing cover and sides 75
Photograph, Wintermint package and counterband.. 79
Defendants' answer filed July 6, 1915, No. 488..... 83
Order granting defendant leave to file interrogatories instanter, No. 488..... 96
Defendants' interrogatories, No. 488..... 97
Answers to interrogatories, No. 488..... 99
Objections to interrogatories, No. 488..... 101
Order setting cause for hearing, No. 30,563..... 103
Answers to interrogatories, No. 488..... 103
Stipulation and answer to defendants' counterclaim, No. 488 105
Order setting cause for hearing, No. 488..... 107
Order of Mar. 12, 1917, consolidating cause Nos. 30,563 and 488 for trial 107
Trial 108

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

PROCEEDINGS IN ORIGINAL TRIAL BEFORE JUDGE ANDERSON (Nos. 30,563 and 488).

Opening statement by counsel for plaintiff..... 108

Plaintiff's Evidence:

Witnesses:

Buck, O. J. 185
Cox, A. G. 171
Cox, J. C. (on rebuttal)..... 488
Fotre, Jacob 213
Hayes, Anna (on rebuttal)..... 490
Kittredge, R. J. 208, 193
Scatchard, William 165
Smith, Albert H. 200
Wrigley, William, Jr. 486, 119

Defendant's Evidence:

Witnesses:

Adams, Gertrude E. 395
Alt, Jacob G. (deposition).....339, 315
Atwater, Bert L. (deposition filed in case of Wrigley Co. vs. Di-gesto Co. in Dist. Court of So. District of New York)..... 458
Cassidy, P. J. 403
Caulfield, J. A. 453
Cochrane, John J. 415
Constantine, Joseph H. 425
Constantine, William H. (deposition)..... 440
Dellenbarger, Charles E. 482
Dillon, Joseph P. 426
Disser, L. J. 399
Engel, Henry 435
Frantz, Charles T. 454

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3900; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Defendant's Witnesses (Continued):

Gorham, Jabez 432
Grzontowski, Bernard F. 436
Hackett, John T. 428
Larson, L. P., Jr. 467
McNamara, James 412
Moore, Robert L. (deposition)..... 339
Nagel, Peter J. (deposition)..... 297
O'Connor, John E. (deposition)..... 304
Pulver, Frank F. (deposition)..... 218
Pulver, Henry H. (deposition)..... 308
Rowley, Henry (deposition)..... 360
Schrader, William E. 430
St. Louis, Oscar 407
Thomas, Frank (deposition) 341
Troy, Gary S. 423
White, William J. (deposition)..... 354
Wrigley, William, Jr. 366

Defendant's Exhibits:

No. 1—Extract from record, case of Wrigley Co. vs. Continental Vending Co., et al. from Dist. Court for Western Dist. of New York:
Bill of complaint 270
Subpoena 281
Marshal's return 281
Answer 283
Replication 292
Final decree 293
No. 2—File Wrapper of Trade-mark No. 102,000 registered Jan. 19, 1915, by Wrigley Co.. .. 320
No. 3—File Wrapper of Trade-mark No. 102,001 registered Jan. 19, 1915, by Wrigley Co..... 330

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Defendant's Exhibits (Continued):

No. 4—Certificate of registration, etc., of trade-mark No. 64,816 registered by Wrigley Co., Aug. 20, 1907 368
No. 5—File Wrapper of abandoned application for registration of trade-mark of Wrigley Co. filed Dec. 12, 1907..... 372
No. 6—Certificate of registration, etc., of trade-mark No. 98,540 registered by Larson Co. July 21, 1914 380
No. 7—Certificate re: Larson trade-mark No. 98,540 384
No. 8—File Wrapper of Trade-mark No. 98,540 registered by Larson Co., July 21, 1914..... 385
No. 9—Letter, 9-15-08, Wrigley Co. to "Whom it may concern"..... 404
No. 10—Letter, Mar. 21, 1907, Wrigley Co. to Mr. St. Louis 408
No. 11—Letter, June 24, 1907, Wrigley Co. to Mr. St. Louis 409
No. 12—Letter, Dec. 9, 1907, Wrigley Co. to O. St. Louis. 410
No. 13—Letter, Feb. 25, 1908, Wrigley Co. to O. St. Louis 410
No. 14—Letter, May 29, 1914, Larson to Wrigley 467
No. 15—Letter, June 2, 1914, Cox to Larson Co. 468
No. 16—Letter, June 3, 1914, Larson to Wrigley Co..... 468
No. 17—Letter, Aug. 3, 1914, D'Emo to Larson. 474
No. 17½—Letter, May 1, 1914, Larson Co. to Kittredge 477
No. 18—Certificate of registration of Larson trade-mark No. 85,910..... 478

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

CERTIFICATE OF EVIDENCE.

Evidence and proceedings before the Master:

Rule on Wrigley Co. to furnish account..... 519
Colloquy between counsel..... 753
Motion for instructions to Marwick, Mitchell, Peat & Co., accountants 1154
Ruling of Master on Canadian and Australian accounting 1160
Proceedings of Feb. 16, 1922.....1579-1595

Evidence on behalf of L. P. Larson, Jr., Company:

Witnesses:

Adams, Gertrude 527
Aldrich, Charles H. 2591
Atwater, Burt L. 531
Buck, Charles G. 1559
Buck, Nelson L. 637, 596, 544
Buck, O. J. 526
Cochrane, John J. 528
Constantine, William H. 533
Cox, J. C. 537, 526
Eckerly, Edward W.....
.....2671, 744, 696, 673, 657, 643, 632, 549
Freeman, Herbert C. 1418
Gledhill, Edward 1099
Grzontowski, Bernard F. 530
Hagberg, John S. 1381
Larson, L. P., Jr. 524, 521
Loveless, Mrs. A. G. 522
Paine, Herman S. 1163, 593, 567, 552
Pallin, L. C. 2644
Schrader, William E. 530

L. P. Larson Jr. Company Witnesses (Continued):

Stanley, William H. .....
.....745, 696, 689, 674, 663, 646, 639, 634, 628
Steven, James Angus.....1503
Vincent, W. W.....2699, 2675, 1620, 1339, 1198
Whitworth, Charles Rupert....1597, 1396, 1315, 1145
Wrigley, William, Jr. 592, 582, 568

L. P. Larson, Jr., Company's Exhibits (See also index pages xxxvi to xlii):

No. 1—Letter, Oct. 1, 1918, Aldrich to Judge Baker 522
No. 2—Letter, Oct. 2, 1918, Offield to Judge Baker 523
No. 3—Letter, Oct. 10, 1918, Offield to Judge Baker 524
No. 10—Financial statement of Wrigley Co., dated Jan. 1, 1915 569
No. 11—Financial statement of Wrigley Co., dated Dec. 18, 1915..... 570
No. 12—Financial statement of Wrigley Co., dated Dec. 18, 1916 571
No. 13—Financial statement of Wrigley Co., dated Dec. 18, 1917..... 571
No. 15—Report made to Dun's agency..... 575
No. 18—List of stockholders of Wrigley Companies 588
No. 19—Income tax returns, etc..... 591
Nos. 22A to F—Statements showing general expenses during accounting period, etc. (description of) 646
No. 24—Statement of amounts expended by Wrigley Co. in advertising..... 662

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

L. P. Larson Jr. Company Exhibits (Continued):

No. 26—Outside and inside of Doublemint counterband containing U. P. S. coupon..... 683
No. 27—No. 1 coupon packed with Wrigley Juicy Fruit Long Bar..... 684
No. 28—Five coupon certificate packed in gum boxes..... 685
No. 29—Certificate of 25 coupons issued jobbers' salesmen..... 687
No. 33—(Excerpt) return card..... 783
*No. 31—(Excerpt) pencil notation..... 843
*No. 37—Billboard advertisement..... 726
*No. 38—First Doublemint newspaper ad... 732
*No. 83—Peptomint label..... 946
*No. 91—Letterhead of Larson Co..... 961
*No. 93—Excerpt from report of May 15, 1919, of Edw. R. Burt Co..... 986
*No. 94—Statement of boxes of gum sold by Larson Co. from Dec., 1913, to Nov., 1918 984
*No. 98—List of states in which Larson Co. did business from Dec., 1913, to Aug., 1914..... 992
*No. 101—Statement of sales of Larson Co. of all brands from Jan. to Nov., 1913....1008
*No. 121—List of states in which Wintermint gum was sold from Dec., 1913, to Aug., 1914.....1057
*No. 130—Wintermint counterbands and stick bands, A to D.....1096
No. 138—Statement prepared by Freeman showing per cent of advertising to sales.....1419
No. 168—Statement reconciling figures relating to advertising from records with figures shown by Touche, Niven & Co.....2251

* Wm. Wrigley, Jr., Co. Exhibit.

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

L. P. Larson Jr. Company Exhibits (Continued):

No. 185—Charles G. Buck Co. account with Larson Co. from Jan., 1913 to Dec., 1913.....2652
No. 186—Statement of account with Charles G. Buck, June, 1920 to Feb., 1923.....2657
No. 187—Statement of account with Charles G. Buck from Nov., 1911 to Feb., 1913.....2659
No. 188—Statement of account with Charles G. Buck from Jan., 1914 to Aug., 1917.....2661
No. 194—Statement of reserve for redemption of profit sharing coupons.....2685
No. 195—Wrigley Co. donation of Doublemint, 1915.....1351
No. 196—(Excerpts from) Wrigley Co. war tax rebate certificates.....1352

Motion for instructions to Marwick, Mitchell, Peat & Co., accountants.....1154
Ruling of Master on Canadian and Australian accounting.....1160
Letter, Sept. 22, 1908, Caulfield to Zulu Mfg. Co.1071
Letter, June 3, 1913, Throop to Larson Co. with bill.....1073
Letter, July 9, 1919, Aldrich to Master Morrison.....1127
Letter, Jan. 7, 1920, Mayer to Master Morrison.1131
Letter, May 25, 1920, Aldrich to Mayer.....1150

Evidence on behalf of William Wrigley, Jr., Company:

Aldrich, Charles H. 2642, 2605
Atwood, Charles A. 2213, 1915
Becker, Philip L. 2275
Becton, Frederick I. 1885
Bennington, Harold .....
....2704, 2688, 2610, 2512, 2450, 2445, 2440, 2435, 2417

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wm. Wrigley Jr. Company Witnesses (Continued):

Botz, James H. 1776
Brenner, Allan L 1741
Brine, Harry C. 1755
Buck, Nelson L. 2297, 1954
Downey, James T. 2242
Eckerly, Edward W. 2476, 2450, 2442, 2406
Emerich, Melvin M. 2325
Goetzinger, M. E. 1828
Hart, Lee Joseph 1644
Hitchcock, Fremont B. 2329
Hunter, John R. 1942
Hylleberg, Peter A. 2234
Larson, L. P., Jr. .....
..2710, 2635, 2594, 2587, 2507, 2465, 2459, 1133, 1120, 857
Lebair, Harold A. 1801
Kraus, Joseph M. 1597
Mace, Alfred C., Jr 1702
Mayer, Isaac H. 1951
Mortimore, Edwin Bradley 1865
Pallin, L. C. 2644, 1949
Parsons, Charles S. 1852
Reinach, Udl M. 1834
Richards, Moses H. 1844
Rieck, Louis C. 1728
Rowley, Lenson H. 1688
Schott, Henry 1875, 1626
Sessions, Frank L. 2332
Stanley, William H. 2707, 2686, 2673, 2644,
2601, 2464, 2452, 2439, 2425, 2339, 2248, 2230, 2216, 2120
Stewart, Samuel C. 2224
Toms, Clinton W. 1661
Vincent, W. W. 2267

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4063-4491.)

William Wrigley, Jr., Company Exhibits (see also index pages xxii to xxxv):

Touche Exhibit 22—Summary of time sheets.....1262
Touche Exhibits 24A to F—(Excerpts from).....1294
No. 11—Sheet from "Touche working papers"....1621
No. 55—Statement of certificates issued by United Cigar Stores Co. 1890
No. 56—Statement of coupons sold, redeemed by United Profit Sharing Corp.....1893
No. 57—Redemption of Wrigley coupons through mail order dept. compared with total redemptions, 1916 to 1918.....1896
No. 59—United Profit Sharing Corp. percentage of premium articles issued by coupon value.....1900
No. 60—United Cigar Stores Co. percentage of premium articles issued by coupon value.....1901
No. 63—Atwood 2—Statement of coupon account of Proctor & Gamble Dist. Co.1910 to 1921.....1919
No. 63—Atwood 3—Analysis Proctor & Gamble Dist. Co.'s premium coupons received in mails Nov. 3, 1922 1921
No. 63—Atwood 7—Statement of coupon account, 1904 to 1921 2215
No. 64—Buck No. 14—Table of savings by operating Price machine 1979
No. 64—Buck No. 15—Tabulation, savings Price machine over old machines.....1985
No. 64—Buck No. 17—Tabulation, Chicago sheeting machine savings 1997
No. 64—Buck No. 18—Chicago factory savings in depreciation and interest by operating Price machines 2002

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wm. Wrigley Jr. Company Exhibits (Continued):

No. 64—Buck No. 21—Brooklyn savings by operating Price machines 2012

No. 64—Buck No. 22—Brooklyn sheeting machine savings 2013

No. 64—Buck No. 23—Brooklyn savings in depreciation and interest by operating Price machines....2014

No. 64—Buck No. 26—Brooklyn total savings from 1911 to 1918 2017

No. 64—Buck No. 27—Toronto savings by operating Price wrapping machines 2019

No. 64—Buck No. 28—Toronto sheeting machine savings 2019

No. 64—Buck No. 29—Toronto savings in depreciation and interest by operating Price machines....2020

No. 64—Buck No. 30—Recapitulation of savings at Toronto 2021

No. 64—Buck No. 43—Savings effected by use of Price type wrapping machines KL & KLM from Aug., 1914, to Nov., 1918, in wrapping s s gum....2031

No. 64—Buck No. 46—Chicago recapitulation of savings accruing to Doublemint by being manufactured with patented machinery during accounting period 2040

No. 64—Buck No. 55—Chicago, Brooklyn and Toronto recapitulation of savings accruing to Doublemint by being manufactured with patented machinery 2046

No. 65—Stanley No. 33—War tax rebate certificate.2262

Salary of executive officers from 1911 to 1918.....2393

No. 72—Doublemint coupon wrapper.....2406

No. 79—Counterband Doublemint gum made for Van-Noy Interstate Co.....2409

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wm. Wrigley Jr. Company Exhibits (Continued):

No. 87—Counterband Doublemint gum sold in north China 2411
No. 88—Counterband Doublemint gum sold in France 2411
No. 89—Counterband Doublemint gum sold in Java.2412
No. 90—Counterband Doublemint gum sold in Straits Settlements 2412
No. 91—Statement of sales of Doublemint gum wrapped in foreign language wrappers.....2416
No. 92—Bennington 20—Statement re: Federal Income Tax on profits of Doublemint.....2689
No. 97—Label used on inside cover.....2480
No. 98—Label used on outside cover.....2481
No. 99—Label used on bottom.....2482
No. 100—First Doublemint sales by states.....2484
No. 101—Boxes Doublemint shipped 1914.....2486
No. 102-A—Data on Profit Sharing coupons, 1914 to 1923 2674
No. 107—Percentage of net profits to sales, 1911 to 1918 2688
Larson Exhibit 31—(Excerpt) pencil notation..... 843
Larson Exhibit 37—Billboard advertisement 726
Larson Exhibit 38—First Doublemint newspaper ad. 732
Larson Exhibit 83—Peptomint label 946
Larson Exhibit 91—Letterhead of Larson Co..... 961
Larson Exhibit 93—Excerpt from report of May 15, 1919 of Burt Co. 986
Larson Exhibit 94—Statement of boxes of gum sold by Larson Co. from Dec., 1913 to Nov., 1918..... 984
Larson Exhibit 98—List of states in which Larson Co. did business from Dec., 1913 to Aug., 1914.... 992

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wm. Wrigley Jr. Company Exhibits (Continued):

Larson Exhibit 101—Statement of sales of Larson Co. of all brands from Jan. to Nov., 1913.....1008
Larson Exhibit 121—List of states in which Wintermint gum was sold from Dec., 1913 to Aug., 1914..1057
Larson Exhibit 130—Wintermint counterbands and stick bands 1096
Statement of salaries of executive officers of Wrigley Co., 1911 to 1918.....2393
Notice of attorney's lien.....2458

Extracts called to attention of Master from proceedings before Judge Anderson:

Defendant's Exhibit 14—Letter, May 29, 1914, Larson to Wrigley 2714
Defendant's Exhibit 15—Letter, June 2, 1914, Cox to Larson 2714
Defendant's Exhibit 16—Letter, June 3, 1914, Larson to Wrigley 2715
Exhibit 10—Contract, Dec. 19, 1913, between Wrigley Co., Pulver and Offield.....2731
Exhibit 11—Articles of Agreement.....2733
Exhibit 12—Articles of Agreement.....2738
Exhibit 13—Final decree entered in case of Wrigley Co. vs. Di-gesto Co., et al. in U. S. Dist. Court for Southern Dist. of New York.....2743
Testimony of L. P. Larson, Jr.....2745
Testimony of William Wrigley, Jr.....2748
Testimony of William Scatchard.....2749
Testimony of A. G. Cox.....2479
Testimony of O. J. Buck.....2751
Testimony of R. J. Kittredge.....2752
Testimony of Albert H. Smith.....2753

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Extract from proceedings before Judge Wilkerson (on argument on exceptions to Master's Report):

Memorandum prepared by Bennington and Vincent 2756

Schedule A—Doublemint proportion of total cost of advertising, etc..... 2758

Schedule B—Doublemint proportions of total cost of advertising, etc..... 2760

Memorandum prepared by Bennington and Vincent relating to "Contingent Liability for U. P. S. Coupons," etc. 2761

Memorandum prepared by Bennington and Vincent relating to "Advertising Material," etc.... 2761

Memorandum prepared by Bennington and Vincent, etc..... 2763

Certificate of Judge 2765

Master's summons 2766

Wrigley Company's statement of account..... 2768-2804

Appointment of James Hall as accountant to examine Wrigley Company's books..... 2805

James Hall report 2806-2951

Burt statement 2952-2960

Excerpts from Master's Records:

Excerpts from meetings of stockholders of Wrigley Co..... 2963

Letter, Jan. 4, 1916, case to Wrigley Co..... 2965

Letter, Jan. 6, 1916, Wrigley Co. to Case..... 2966

Contract dated Feb. 17, 1916..... 2967

Schedule A—Tangible assets..... 2969

Schedule B—Intangible assets..... 2970

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Excerpts from Master's Records (Continued):

Letters patent incorporating Wrigley Canadian Company 2970
Letter, July 9, 1919, Aldrich to Morrison..... 2978
Letter, Jan. 7, 1920, Mayer to Morrison..... 2981
Special report on Canadian Doublemint accounting, 1916 to 1921..... 2985-3017
Testimony of L. P. Larson, Jr..... 3019
Certificate of Master..... 3023

Order setting date for hearing on motion for rule on Larson to answer certain questions..... 3024
Order continuing motion..... 3024
Opinion in No. 488 filed Mar. 19, 1920..... 3025
Order granting motion to compel Larson to answer certain questions, etc. 3029
Order continuing motion 3030
Stipulation as to transcript of record on appeal and order approving stipulation 3031

MANDAMUS RECORD.

Motion for leave to file petition for writ of mandamus... 3033
Petition for writ of mandamus..... 3033
Exhibit A—Decree (referred to)..... 3040
Exhibit B—Master's order that Wrigley Co. file account 3041
Exhibit C—List of demands and inquiries made with reference to petitioner's business, etc..... 3041
Exhibits D & E—(Referred to)..... 3049

Return to petition for writ of mandamus..... 3050
Exhibit A—Opinion (referred to)..... 3056
Exhibit B—Additional extracts from the records and proceedings before the Master..... 3057

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Notice of filing affidavit 3066
Affidavit of L. P. Larson, Jr.....3067
Exhibit 1—Proposed decree submitted by counsel for Wrigley Co. 3074
Exhibit 2—Proposed decree submitted by counsel for Wrigley Co. 3076
Exhibit 4—(Referred to) 3078
Mandate of Court of Appeals filed Sept. 26, 1921.....3079
Mandamus filed Jan. 24, 1924.....3083

Opening argument by Mr. Mayer.....3093
Argument by Mr. Aldrich.....3099
Reply argument by Mr. Mayer.....3115
Reply argument by Mr. Aldrich.....3176
Motion of Larson Co amend order.....3180
Exhibit A—Extract from proceedings of Sept. 22nd In re what Mr. Mayer intends to prove, etc.....3187
Exhibit B—Excerpts from report of proceedings before Circuit Court of Appeals in re petition of L. P. Larson, Jr. Company.....3189
Proceedings before Circuit Court of Appeals on Oct. 4, 1921, on motion.....3199
Order of Court of Appeals entered Oct. 4, 1921, denying petition for writ of mandamus.....3489

Master's report filed Nov. 13, 1923.....3203-3244
Objection Exhibit A—Objections and exceptions of Wrigley Co. to Master's report.....3245-3309
Wrigley Co. exceptions to Master's report.....3309-3363
Order taking motion for entry of decree under advisement 3363
Order of Mar. 7, 1925, withdrawing decision heretofore field 3363

(Vol. I, 1-518; Vol. II, 515-1098; Vol. III, 1099 1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Order continuing motion 3364
Order in re exhibits before the Master.....3364
Decision filed Mar. 14, 1925, on exceptions to Master's report 3365-3399
Decree of Mar. 20, 1925.....3400
Petition of Wrigley Co. for appeal.....3401
Assignment of errors of Wrigley Co.....3402-3456
Order allowing appeal to Wrigley Co.....3457
Appeal bond of Wrigley Co.....3458
Petition of Larson Co. for appeal.....3460
Assignment of errors of Larson Co.....3461
Order allowing appeal to Larson Co.....3464
Appeal bond of Larson Co.....3464
Order fixing time to file condensed statement of evidence, etc. 3466
Order extending time to Wrigley Co. to docket case in Circuit Court of Appeals to Aug. 7, 1925.....3467
Order extending time to Larson Co. to file record in Court of Appeals thirty days.....3467
Order continuing motion 3468
Order approving stipulation and extending time to Wrigley Co. to docket case in Court of Appeals to Aug. 12, 1925 3468
Stipulation as to transcript of record and filing and printing same in Court of Appeals.....3469
Order extending time to file record in Court of Appeals to Sept. 28, 1925.....3471
Stipulation and order that Wrigley Co. have to Sept. 1, 1925, to file statement of evidence.....3472
Order extending time to docket case in Court of Appeals to Oct. 20, 1925.....3474
Order extending time to docket case in Court of Appeals to Nov. 23, 1925 3475

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Orders continuing motions to approve or amend statement of evidence 3475-3480
Order extending time to docket case in Court of Appeals to Dec. 23, 1925.....3476
Orders extending time to docket case in Court of Appeals to Jan. 4, 1926.....3480-3481
Order that statement of evidence may be withdrawn to make amendments 3481
Order approving statement of evidence.....3482
Order extending time to docket case in Court of Appeals to Jan. 11, 1926 3482
Order extending time to docket case in Court of Appeals to Jan. 21, 1926.....3483
Sitpulation filed Jan. 16, 1926, directing Clerk to amend transcript 3484
Order as to extensions of time.....3485
Stipulation and directions filed Jan. 25, 1926, to Clerk to amend transcript 3486
Stipulation that Clerk need not make copies of certificate of evidence 3487
Stipulation and directions filed Feb. 22, 1926, to Clerk to amend transcript 3487
Order extending time to docket case in Court of Appeals to Jan. 27, 1926 3492
Larson Company's praecipe for record.....3493
Wrigley Company's praecipe for record.....3495
Certificate of Clerk 3501
Citation to L. P. Larson, Jr., Company.....3502
Citation to Wm. Wrigley, Jr., Company.....3503
Stipulations filed May 12, 1926, that certain duplications in record need not be printed.....3504
Stipulation filed June 2, 1926, correcting record 3505

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

BOOK OF EXHIBITS.
(Volumes 8, 9, 10.)

WRIGLEY EXHIBIT—
(Introduced by Wm. Wrigley, Jr., Company.)

No. 1—Advertisement of Paris Garters.....3507
No. 2—Advertisement of Paris Garters.....3508
No. 3—Advertisement of Paris Garters.....3509
No. 4—Advertisement of Paris Garters.....3510
No. 5—Advertisement of Hickory Garters.....3511
No. 6—Advertisement of Hickory Garters.....3512
No. 7—Advertisement of Hickory Garters.....3513
No. 8—Poster advertising Butternut Bread.....3514
No. 8-A—Cut-out advertising Luxury Cake.....3515
No. 9—Advertisement of Schulze's Butternut Bread....3516
No. 9-A—Street car card advertising Schulze's Luxury Cake and Butter-nut Bread.....3517
No. 10—Canadian Gov't receipt dated Nov. 8, 1920.....3518
No. 11—Touche Niven & Co. working sheet No. 790....3519
No. 12-B—Touche Niven & Co. working sheet No. 686...3520
No. 12-A—Touche Niven & Co. working sheet No. 685 ..3521
No. 15-A—Page from Montgomery Ward catalog.....3522
No. 15-B—Outside cover of catalog.....3523
No. 16—Advertisement of Park & Tilford.....3524
No. 17—Advertisement of Park & Tilford.....3525
No. 18—Advertisement of Liggett & Myers Co.....3526
No. 19—Advertisement of Liggett & Myers Co.....3527
No. 22—Advertisement of Jos. Dixon Co.....3528
No. 23—Advertisement of Jos. Dixon Co.....3529
No. 24—Advertisement of Jos. Dixon Co.....3530
No. 25—Advertisement of Nat. Biscuit Co.....3531
No. 26—Advertisement of Nat. Biscuit Co.....3532
No. 27—Advertisement of Nat. Biscuit Co.....3533

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 28—Advertisement of Corn Products Refining Co...3534
No. 29—Advertisement of Corn Products Refining Co...3535
No. 30—Coupon cut-out of Kirkman's Borax Soap Wrapper 3536
No. 31—Coupon cut-out of Kirkman's Floating Soap Wrapper 3537
No. 32—Coupon cut-out from pasteboard carton containing Kirkman's Soap Powder.....3538
No. 33—Coupon cut-out from paper wrapper around container of Kirkman's Cleanser.....3538
No. 34—Outside and inside of wrapper of Kirkman's Borax Soap 3539-3540
No. 36—Page from Kirkman's premium catalog, 1915...3541
No. 37—First page of notice issued by Kirkman & Son..3542
No. 38—Pages from Legal Stamp Book issued by Merchants Legal Stamp Co.....3543
No. 39—Advertisement of Colgate's Ribbon Dental Cream, etc. 3544
No. 40—Advertisement of Colgate's Cashmere Bouquet Toilet Soap 3545
No. 41—Advertisement of Colgate's Tales.....3546
No. 42—Advertisement of Bayuk products.....3547
No. 52—Kirkman No. 1—Coupon issued by Kirkman & Son dated 9-06.....3348
No. 53—
Borden No. 1—Label of Borden Co. Magnolia Brand Condensed Milk 3549
Borden No. 2—Label of Challenge Brand Condensed Milk 3550
Borden No. 3—Label of Peninsular Brand Condensed Milk 3551
Borden No. 4—Label of Standard Brand Condensed Milk 3552

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 53—(Continued):
Borden No. 5—Label of Darling Brand Condensed Milk 3553
Borden No. 6—Label of Star Brand Condensed Milk .3554
Borden No. 7—Label of Pearl Brand Evaporated Milk 3555
No. 54, Becton No. 1—One-half coupon issued by United Cigar Stores Co. 3556
No. 55—Statement showing number of certificates issued and redeemed yearly by United Cigar Stores Co.....3557
No. 56—Statement showing issue and redempton of U. P. S. regular coupons paid for at time of issue.....3558
No. 57—Statement showing redemption of Wrigley coupons through mail order dept. compared with total redemptions 3558
No. 59—United Profit Sharing Corp. percentage of premium articles issued—by coupon value.....3559
No. 60—United Cigar Stores Co. percentage of premium articles issued—by coupon value.....3559
No. 63—
Atwood No. 1—Star Soap Wrapper used by Proctor & Gamble 1903 to 1916, front and back.....3560-3561
Atwood No. 2—Proctor & Gamble statistical statement of coupon account, 1910 to 1921.....3568
Atwood No. 3—"Analysis" Proctor & Gamble premium coupons received in mails Nov. 3, 1912.....3569
Atwood No. 4—Starr Soap Wrapper used by Proctor & Gamble 1916 to 1918.....3563
Atwood No. 5—Starr Soap Wrapper used by Proctor & Gamble 1918 to 1919.....3564-3565
Atwood No. 6—Star Soap wrapper used by Proctor & Gamble 1919.....3566-3567
Atwood No. 7—Statistical statement, coupon account Proctor & Gamble Co., 1904 to 1921.....3654

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 64—

Buck No. 5—Pat. No. 1,185,822, A. M. Price, June 6, 1916 4448

Buck No. 7—Photograph showing taking gum from kettle and depositing in hopper 3570

Buck No. 8—Photograph showing depositing of sheets of gum on trays 3571

Buck No. 9—Package of gum produced on Redington machine 3572

Buck No. 10—Redington and Condon package 3573

Buck No. 11—Redington, Condon & Bander package. 3574

Buck No. 12—Wrapper for package of Doublemint produced on Price K L M machine 3575

Buck No. 13—Wrapper for package Peppermint produced on Price K L M machine 3576

Buck No. 14—Tabulation recap. of savings Chicago, etc. 3577

Buck No. 15—Tabulation savings by operating Price wrapping machines 3578

Buck No. 16—Wrapper for K L package 3579

Buck No. 17—Tabulation Chicago Sheeting Machine savings 3580

Buck No. 18—Tabulation Chicago Factory savings in depreciation and interest by operating Price machines, etc. 3581

Buck No. 19—Recap. of savings Chicago with interest 6 per cent 3582

Buck No. 20—Recap. of savings Chicago with interest 5 per cent 3583

Buck No. 21—Brooklyn savings by operating Price machines 3584

Buck No. 22—Brooklyn sheeting machine savings ... 3585

Buck No. 23—Brooklyn Factory savings in depreciation and interest 3586

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3900; Vol. IX, 3901-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 64—(Continued):
Buck No. 24—Recap. of savings Brooklyn with interest at 6 per cent....3587
Buck No. 25—Recap. of savings Brooklyn with interest at 5 per cent....3588
Buck No. 26—Recap. of savings Brooklyn with interest at 7 per cent....3589
Buck No. 27—Toronto wrapping machine savings...3590
Buck No. 28—Toronto sheeting machine savings....3590
Buck No. 29—Toronto savings in depreciation and interest....3591
Buck No. 30—Recap. of savings Toronto with interest at 7 per cent....3592
Buck No. 31—Recap. of savings Toronto with interest at 6 per cent....3592
Buck No. 32—Recap. of savings Toronto with savings at 5 per cent....3593
Buck No. 33—Contract dated Oct. 15, 1910, between Price and Zeno Mfg. Co....3594
Buck No. 34—Zeno Mfg. Co. proposition to Wrigley Co....3596
Buck No. 35—Conveyance from Zeno Mfg. Co. to Wrigley Co. dated Jan. 3, 1911....3598
Buck No. 36—Assignment of Pat. No. 968,109 to Wrigley Co....3601
Buck No. 37—Assignment of Pat. No. 965,598 to Wrigley Co....3603
Buck No. 38—Assignment of Pat. No. 968,110 to Wrigley Co....3605
Buck No. 39—Assignment of Pat. No. 1,185,822 to Wrigley Co....3607
Buck No. 40—Assignment of Pat. No. 1,109,461 to Wrigley Co....3609

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 64—(Continued):
Buck No. 41—Letter, Mar. 9, 1922, Aldrich to Mayer & Lane 3611
Buck No. 42—Letter, Mar. 24, 1922, to Aldrich..... 3612
Buck No. 43—Savings by use of Price wrapping machines Aug. 1914 to Nov. 1918..... 3613
Buck No. 44—Chicago sheeting machine savings.... 3614
Buck No. 44-A—Chicago sheeting machine savings during accounting period accruing to Doublemint. 3615
Buck No. 45—Chicago Factory savings in depreciation and interest 3616
Buck No. 45-A—Chicago Factory supplementary savings in depreciation and interest..... 3617
Buck No. 46—Chicago recap. of savings accruing to Doublemint by being manufactured by patented machinery, etc., with interest at 7 per cent..... 3618
Buck No. 46-A—Same as No. 46, with interest at 6 per cent 3618
Buck No. 46-B—Same as No. 46, with interest at 5 per cent 3619
Buck No. 47—Brooklyn savings by use of Price machine, Aug. 1914 to Nov. 1918..... 3620
Buck No. 48—Brooklyn sheeting machine savings during accounting period as accruing to Doublemint 3620
Buck No. 49—Brooklyn savings in depreciation and interest by use of Price machines, etc., interest at 7 per cent 3621
Buck No. 50—Brooklyn recap. of savings accruing to Doublemint, etc., interest at 7 per cent..... 3622
Buck No. 50-A—Same as Buck No. 50, with interest at 6 per cent 3622

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 64—(Continued):
Buck No. 50-B—Same as Buck No. 50 with interest at 5 per cent 3623
Buck No. 51—Toronto savings by use of Price machines from Aug. 1914 to 1915 accruing to Doublemint 3624
Buck No. 52—Toronto sheeting machine savings during accounting period as accruing to Doublemint..3624
Buck No. 53—Toronto Factory savings in depreciation and interest by operating Price machines as accruing to Doublemint.....3625
Buck No. 54—Toronto recap. of savings accruing to Doublemint by being manufactured by patented machinery during accounting period with interest at 7 per cent.....3626
Buck No. 54-A—Same as Buck No. 54, with interest at 6 per cent.....3626
Buck No. 54-B—Same as Buck No. 54, with interest at 5 per cent 3627
Buck No. 55—Recap. of savings accruing to Doublemint by being manufactured with patented machinery, Chicago-Brooklyn-Toronto 3628
Buck No. 56-A—Contract dated Jan. 2, 1905, between New York Wrapping Machine Co. and Rubber Paint Co. 3629
Buck No. 56-B—Contract dated Jan. 2, 1905, between New York Wrapping Machine Co. and Rubber Paint Co. 3634
Buck No. 56-C—Contract dated Nov. 17, 1906, between New York Wrapping Machine Co. and Rubber Paint Co. 3639
Buck No. 57—Certified copy assignment of Pat. No. 992,590, to Zeno Mfg. Co.....3655

(Vol. I, 1-548; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 64—(Continued):
Buck No. 58—Assignment of applications which resulted in Pat. No. 992,590 to Wrigley Co. 3657
Buck No. 59—Contract dated Nov. 26, 1909, between Zeno Mfg. Co. and Barbieri and Dellenbarger Co. . 3659
Buck No. 61—Price KLM machine 3660
Buck No. 62—Assignment dated Sept. 7, 1910, to Zeno Mfg. Co. 3661
Buck No. 63—Agreement dated Feb. 18, 1911, between Barbieri & Dellenbarger Co., Wrigley Co. and Zeno Mfg. Co 3663
Buck No. 64—Payments made in connection with Price machines 3665

No. 65—
Stanley No. 1—Document headed "Filed Account . . 3642
Stanley No. 2—Revision of Field Account 3642
Stanley No. 3—Method "A" 3643
Stanley No. 4—Statement re advertising 3644
Stanley No. 5—Statement of cost of "Wrigley's" in ads 3644
Stanley No. 6—Amount included in Method "A" for "Wrigley's" 3644
Stanley No. 7—Document, "A-1" 3645
Stanley No. 8—Document, "Method A-1" 3645
Stanley No. 9—Differences between Method A and Method A-1 3646
Stanley No. 10—Cost of ads where no brand is mentioned 3647
Stanley No. 11—Document "B" 3647
Stanley No. 12—Method B 3648
Stanley No. 13—Advertising charged to Doublemint 3649

Wrigley Exhibit No. 65—(Continued):
Stanley No. 14—Cost of prominent "Wrigley's" in ads 3649
Stanley No. 15—Amount included in Method B for "Wrigley's" 3649
Stanley No. 16—Statement B-1 3650
Stanley No. 17—Statement "Method B-1" 3650
Stanley No. 18—Difference between Method B and Method B-1 3651
Stanley No. 19—Cost of prominent "Wrigley's" in ads (under Method B-1) 3652
Stanley No. 20—Cost of Doublemint advertising 3652
Stanley No. 30—Match book cover 3653
Stanley No. 31—Statement of net sales by months, 1913 and 1914 3669
Stanley No. 32—Distribution of United Cigar Stores . 3670
Stanley No. 33—War tax rebate certificate 3671
No. 70—Emerich 1—Statement "New issues of preferred stock offered by Ames, Emerich & Co 3672
No. 71—Stanley No. 1—Summary 3673
No. 72—Doublemint counterband at time it was first marketed 3681
No. 79—Doublemint counterband wrapper coupon put out for Van Noy Interstate Co 3682
No. 80—Doublemint counterband wrapper coupon put out for Union News Co 3683
No. 81—Doublemint counterband wrapper coupon put out for Parker Ry. News Co 3684
No. 82—Doublemint counterband wrapper coupon put out for Long Island News Co 3685
No. 83—Doublemint counterband wrapper coupon put out for Inter City Car Adv. Co 3836

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 84—Doublemint counterband wrapper coupon put out for Crescent News & Hotel Co.....3687
No. 85—Doublemint counterband wrapper coupon put out for Broadway Subway & Home Boroughs Car Adv. Co.....3688
No 86—Doublemint counterband wrapper coupon put out for A. D. & N. Co.....3689
No. 87—Doublemint counterband wrapper coupon sold in North China 3690
No. 88—Doublemint counterband wrapper coupon sold in France 3691
No. 89—Doublemint counterband wrapper coupon sold in Java 3692
No. 90—Doublemint counterband wrapper coupon sold in Straits Settlements 3693
No. 91—Statement of domestic and foreign sales.....3694
No. 92—
Bennington No. 1—Reckitt Report, Revised accounting filed by Wrigley Co.....3695
Index to attached exhibits and statements.....3712
Bennington No. 2—Manufacturing profit on Doublemint, etc. 3800
Bennington No. 3—Interest on capital invested at 5 per cent 3801
Bennington No. 4—Interest on capital invested at 6 per cent 3804
Bennington No. 5—Interest on capital invested at 5 per cent (excluding good will, etc).....3807
Bennington No. 6—Statement similar to Bennington No. 5 with interest at 6 per cent.....3809
Bennington No. 7—Interest on capital invested in patents, etc., at 5 per cent.....3811

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Exhibit No. 92—(Continued):
Bennington No. 8—Statement similar to Bennington No. 7 with interest at 6 per cent.....3813
Bennington No. 9—Interest on capital invested in patents, etc., average value yearly, interest at 5 per cent 3815
Bennington No. 10—Statement similar to Bennington No. 9 with interest at 6 per cent.....3816
Bennington No. 11—Interest on good will at 5 per cent.....3817
Bennington No. 12—Interest on good will at 6 per cent 3818
Bennington No. 13—Interest on good will at 5 per cent per annum 3819
Bennington No. 14—Statement similar to Bennington No. 13 with interest at 6 per cent.....3820
Bennington No. 15—Proportion of interest on good will, etc. (six sheets).....3821-3826
Bennington No. 16—Statement of percentage of amount of Doublemint sales to amount of all gum sales, etc. 3828
Bennington No. 17—Statement of advertising which would be chargeable to Doublemint, etc.....3827
Bennington No. 18—Reconciliation of 1917-1918 profits shown by books of account.....3829
Bennington No. 19—Documents entitled, Accounts showing profits and losses from July, 1914 to Nov. 1918, from sales of Doublemint with counterband wrappers not bearing name of Wrigley Co. as manufacturers 3830-3851
Bennington No. 20—Calculation of Federal Income Taxes on profits of Doublemint.....3852
Bennington No. 21—Dividends on investments not included in revised account.....3853

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 93—Financial statement of Wrigley Co.....3855
No. 94—Corporation income tax return of Wrigley Co. for 1918 3856
No. 95—Foreign sales from Jan. 1911 to July 1914.....3862
No. 97—Label used on Doublemint Box.....3863
No. 98—Label used on Doublemint Box.....3864
No. 99—Label used on Doublemint Box.....3865
No. 100—First Doublemint sales.....3866
No. 101—Boxes Doublemint shipped, 1914.....3867
No. 102-A—Corrected statement re: United Profit Sharing coupons 3868
No. 104—Invoice showing payment for ad.....3869
No. 105—Notice of attorney's lien.....3870
No. 107—Percentage of net profits of sales 1911 to 1918..3871
No. 108—Certified copy opinion of Iowa District Court, case of Elizabeth Bettendorf v. Jos. Bettendorf, et al..3872

LARSON EXHIBIT—
(*Introduced by Wm. Wrigley Jr. Co.*)

No. 30—Newspaper advertisements.....3890-3891
No. 31—Pages from Wrigley advertising book....3892-3895
No. 32—Pages from Wrigley advertising book....3896-3897
No. 35—Pages from Wrigley advertising book....3898-3902
No. 36—Pages from Wrigley advertising book....3903-3904
No. 37—First Doublemint Billboard Ad.....3905
No. 38—First Doublemint Newspaper Ad.....3906
No. 53—Ad appearing in N. Y. Elevated Station.....3907
No. 54—Statement of foreign advertising expenses.3908-3912
No. 55—Bill from Stewart-Davis Adv. Agency to Wrigley Co. 3913-3962
No. 56—Partial list of merchandise offered in exchange for United Profit Sharing Coupons.....3963-3965
No. 57—Doublemint photo ad 3966

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Co. Exhibits, marked Larson Exhibit—(Continued):
No. 59—Photo ad 3967
No. 60—Photo ad 3968
No. 61—Photo ad 3969
No. 62—Photo ad 3970
No. 63—Photo ad 3971
No. 64—Photo ad 3972
No. 65—Photo ad 3973
No. 66—Photo ad 3974
No. 67—Photo ad 3975
No. 68—Photo ad 3976
No. 69—Photo ad 3977
No. 70—Pages from Larson Co. minute book.....3978
No. 71—Pages from Larson Co. minute book.....3980
No. 74—Larson Co. ledger sheet.....3982
Nos. 76 and 77—Pages from combined journal and cash book of Larson Co.....3983
No. 78—Advertising sheet from Larson ledger.....3984
No. 80—Contract dated Aug. 22, 1911, between Larson Co. and Berger Co. 3986
No. 83—First Peptomint label 3988
No. 85—Larson Co. Letterhead 3989
No. 86—Peptomint Counterband 3990
No. 87—Peptomint Stick Wrapper.....3991
No. 88—Peptomint Coupon 3992
No. 89—Larson Co. circular letter.....3993
No. 91—Larson Co. letterhead.....3994
No. 93—Burt statement re: Wintermint sales.....3995
No. 94—Larson statement of boxes of gum sold.....3997
No. 98—Larson sales by states.....3999
No. 101—Larson statement of boxes of gum sold part of 1913 4000
Nos. 102 to 109—Loose leaf ledger sheets of Larson Co. 4001-4014

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

Wrigley Co. Exhibits, marked Larson Exhibit—(Continued):

No. 110—Page from Larson Journal re: Reddington machine 4015
No. 111—Page from Larson Journal re: Reddington machine 4017
No. 112—Larson Co. photo ad.....4019
No. 113—Larson Co. photo ad.....4020
No. 114—Larson Co. photo ad.....4021
No. 121—Initial sales of Wintermint by states.....4022
No. 126—Sales of Peptomint gum part of 1912, through Zulu Mfg. Co. 4023
No. 130—Two wrappers and counterbands of Wintermint gum 4024
No. 146—Freeman schedule re: capital stock and surplus of Wrigley 4025
No. 147—Working sheet of Touche Niven & Co.....4027
No. 148—Working sheets of Touche Niven & Co. re: sales 4028-4032
No. 154—Steven working papers.....4033
No. 167—Time spent in preparing details of revised amounts to be debited to Doublemint.....4037
No. 185—Larson Co. billhead 4038
No. 198—Documents in re: compensation of Freeman.. 4039-4044

TOUCHE EXHIBIT—
(*Introduced by Wm. Wrigley Jr., Company.*)

No. 24-A—Working sheets 4050
No. 25-A—Working sheets re: Miscellaneous advertising 4053
No. 26—Wrigley notes on advertising.....4055

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

LARSON EXHIBIT—

(*Introduced by L. P. Larson Jr., Company.*)

No. 1—Letter, Oct. 1, 1918, Aldrich to Judge Baker.....4060
No. 2—Letter, Oct. 2, 1918, Offield to Judge Baker.....4061
No. 3—Letter, Oct. 10, 1918, Aldrich to Judge Baker....4063
No. 4—Ad in Sat. Evening Post of Mar. 21, 1914.....4064
No. 9—Ad in Sat. Evening Post of Dec. 12, 1914.....4065
No. 10—Statement of Wrigley Co. Assets and Liabilities, Jan. 1, 1915.....4066
No. 11—Statement of Wrigley Co. Assets and Liabilities Dec. 18, 1915 4067
No. 12—Statement of Wrigley Co. Assets and Liabilities, Dec. 18, 1916 4068
No. 13—Statement of Wrigley Co. Assets and Liabilities Dec. 18, 1917 4069
No. 14—Notice dated Dec. 6, 1918.....4070
No. 15—Statement of Dun Agency.....4071
No. 16—Excerpts of minutes of directors meeting re: Canadian Co., etc., on Jan. 5, 1916.....4072
No. 17—Excerpts of minutes of stockholders held Jan. 5, 1916, etc. 4088
No. 18—Stockholders of Wrigley Companies.....4095
No. 19—Income tax returns and corporation excess profits tax returns 4098-4111
No. 21-A—Doublemint sales Toronto part of 1914.....4112
No. 21-B—Doublemint sales Toronto Jan. to June, 1915..4112
No. 21-C—Doublemint sales Toronto June to Dec., 1915..4113
No. 21-D—Doublemint sales July, 1914, to Nov., 1914...4113
No. 21-E—Doublemint sales Dec. 1 to Dec. 31, 1914.....4114
No. 21-F—Doublemint sales, 1915.....4114
No. 21-G—Doublemint sales, 1916.....4115
No. 21-H—Doublemint sales, Jan. to Oct., 1917.....4116
No. 21-I—Doublemint sales, Nov. 1, 1917 to Dec. 31, 1917.4117

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 21-J—Doublemint sales, Jan. to Aug., 1918.....4118
No. 22-A—General expense, July to Dec., 1914.....4119
No. 22-B—General expense, 1915.....4120
No. 22-C—General expense, 1916.....4121
No. 22-D—General expense, 1917.....4122
No. 22-E—General expense, Jan. to Aug., 1918.....4123
No. 22-F—General expense, Aug., 1918 to Oct., 1918....4124
No. 24—Amounts for advertising all brands.....4124
No. 25-A—Doublemint sales, Aug. to Oct., 1918.....4125
No. 25-B—Doublemint sales, Oct. to Nov., 1918.....4125
No. 26—Outside and inside of Doublemint counterband..4126
No. 27—Coupon packed with Juicy Fruit.....4127
No. 28—Dealers 5 coupon certificate.....4128
No. 29—Dealers 25 coupon certificate.....4129
*No. 30—Newspaper advertisements.....3890-3891
*No. 31—Pages from Wrigley advertising book.3892-3895
*No. 32—Pages from Wrigley advertising book.3896-3897
*No. 35—Pages from Wrigley advertising book.3898-3902
*No. 36—Pages from Wrigley advertising book.3903-3904
*No. 37—First Doublemint billboard ad.....3905
*No. 38—First Doublemint newspaper ad.....3906
No. 44—Photo ad 4130
No. 45—Photo ad 4131
No. 46—Photo ad 4132
No. 48—Photo ad 4133
No. 49—Photo ad 4134
No. 50—Photo ad 4135
*No. 53—Ad appearing in N. Y. Elevated Station..3907
*No. 54—Statement of foreign advertising expenses 3908-3912
*No. 55—Bill from Stewart-Davis Adv. Agency to Wrigley Co. 3913-3962

* Wm. Wrigley, Jr., Co. Exhibit.

*No. 56—Partial list of merchandise offered in exchange for United Profit Sharing Coupons..3963-3965
*No. 57—Doublemint photo ad.....3966
*No. 59—Photo ad 3967
*No. 60—Photo ad 3968
*No. 61—Photo ad 3969
*No. 62—Photo ad 3970
*No. 63—Photo ad 3971
*No. 64—Photo ad 3972
*No. 65—Photo ad 3973
*No. 66—Photo ad 3974
*No. 67—Photo ad 3975
*No. 68—Photo ad 3976
*No. 69—Photo ad 3977
*No. 70—Pages from Larson Co. minute book.....3978
*No. 71—Pages from Larson Co. minute book.....3980
*No. 74—Larson Co. ledger sheet.....3982
*No. 76 and No. 77—Pages from combined journal and cash book of Larson Co.....3983
*No. 78—Advertising sheet from Larson Co. ledger.3984
*No. 80—Contract dated Aug. 22, 1911, between Larson Co. and Berger Co. 3986
*No. 83—First Peptomint label 3988
*No. 85—Larson Co. letterhead.....3989
*No. 86—Peptomint counterband 3990
*No. 87—Peptomint stick wrapper 3991
*No. 88—Peptomint coupon 3992
*No. 89—Larson Co. circular letter 3993
*No. 91—Larson Co. letterhead 3994
*No. 93—Burt statement re: Wintermint sales.....3995
*No. 94—Larson statement of boxes of gum sold...3997

* Wm. Wrigley, Jr., Co. Exhibit.

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

*No. 98—Larson sales by states.....3999
*No. 101—Larson statement of boxes of gum sold part of 1913.....4000
*Nos. 102 to 109—Loose leaf ledger sheets of Larson Co. 4001-4014
*No. 110—Page from Larson Journal re: Reddington machine 4015
*No. 111—Page from Larson Journal re: Reddington machine 4017
*No. 112—Larson Co. photo ad.....4019
*No. 113—Larson Co. photo ad.....4020
*No. 114—Larson Co. photo ad.....4021
*No. 121—Initial sales of Wintermint by states.....4022
*No. 126—Sales of Peptomint gum part of 1912 through Zulu Mfg. Co. 4023
*No. 130—Two wrappers and counterbands of Wintermint Gum 4024
No. 132—Report prepared by Touche-Niven & Co.....4136
No. 133—Bill of complaint and decree, case of Wrigley Co. v. Toledo Chewing Gum Co.....4179
No. 134—Bill of complaint and decree, case of Wrigley Co. v. Goodrich, et al.....4193
No. 135—Bill of complaint and decree, case of Wrigley Co. v. Helmet Co.....4206
No. 136—Bill of complaint and decree, case of Wrigley Co. v. Goldnback.....4220
No. 137—Two bills of complaint and decrees, case of Wrigley Co. v. Colker.....4233
No. 138—Freeman statement re: sales and advertising..4257
No. 139—Freeman tabulation of advertising.....4258
No. 140—Tentative calculation value of good will.....4259

---

* Wm. Wrigley, Jr., Co. Exhibit.

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 141—Financial statement Wrigley Co. Jan. 1, 1910..4260
No. 142—Financial statement Wrigley Co. Dec. 31, 1911.4260
No. 143—Financial statement Wrigley Co. Dec. 31, 1912.4261
No. 144—Financial statement Wrigley Co. Dec. 31, 1913.4261
No. 145—Memorandum on value of good will.....4262
No. 145-A—Revised statement of No. 145.....4263
*No. 146—Freeman schedule re: capital stock and surplus of Wrigley Co.....4025
*No. 147—Working sheet of Touche Niven & Co....4027
*No. 148—Working sheets of Touche Niven & Co. re: sales 4028-4032
No. 151—Freeman valuation of good will.....4264
No. 152—Report of Angus Steven Co. on good will.....4266
No. 153—Wrigley Co. common stock.....4273
*No. 154—Steven working papers.....4033
No. 155—Article by Freeman on good will.....4276
No. 156—Match container 4294
No. 162—Contract dated Oct. 24, 1912, between Price and Wrigley Co. 4295
No. 163—Contract dated Aug. 5, 1915, between Price and Wrigley Co. 4298
No. 164—Contract dated July 18, 1916, between Price and Wrigley Co. 4303
No. 167—Time spent in preparing details of revised amounts to be debited to Doublemint.....4309
*No. 167—Same as above (a Wrigley exhibit).....4037
No. 168—Statement reconciling advertising figures with Touche-Niven 4310
No. 169—Letter, Apr. 7, 1909, Barbieri to Zeno Mfg. Co..4311
No. 170—Letter, July 9, 1910, Dellenbarger to Zeno Mfg. Co.....4312
No. 171—Letter, July 13, 1910, Dellenbarger to Zeno Mfg. Co.....4313

---

* Wm. Wrigley, Jr., Co. Exhibit.

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

No. 172—Letter, Aug. 19, 1910, Dellenbarger to Zeno Mfg. Co. 4314
No. 173—Document, Hauling stock, etc., from old to new plant 4315
*No. 185—Larson Co. billhead 4038
No. 189—Check, Jan. 7, 1914, Larson to Buck 4319
No. 190—Stub of check 4329
No. 191—Letter, Oct. 8, 1918, Parkinson & Lane to Aldrich with 2 forms of decree attached 4321
No. 192—Letter, Oct. 10, 1918, Parkinson & Lane to Aldrich with 2 forms of decree attached 4326
No. 193—Vincent statement on U. P. S. coupons 4330
No. 194—Wrigley Co. reserve for redemption of U. P. S. coupons 4331
No. 196—Statement of relation of profits to sales, 1914 to 1918 4332
No. 197—Working sheet showing relation of profits to net sales 4333
*No. 198—Documents in re: compensation to Freeman 4039

BUCK EXHIBIT—

(*Introduced by L. P. Larson Jr., Company.*)

A—Summary of Doublemint manufacturing costs, 1914-1918 4335
B—Doublemint Chicago factory costs, 1914 4336
C—Doublemint Chicago factory costs, 1915 4337
D—Doublemint Chicago factory costs, 1916 4338
E—Doublemint Chicago factory costs, 1917 4339
F—Doublemint Chicago factory costs, 1918 4340
G—Summary of supplementary Doublemint costs Chicago factory, 1918 4341
H—Doublemint Brooklyn factory costs, 1914 4342

* Wm. Wrigley, Jr., Co. Exhibit.

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099 1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801 4059; Vol. X, 4060-4491.)

I—Doublemint Brooklyn factory costs, 1915.....4343
J—Doublemint Brooklyn factory costs, 1916.....4344
K—Doublemint Brooklyn factory costs, 1917.....4345
L—Doublemint Brooklyn factory costs, 1918.....4346
M—Supplementary Doublemint costs Brooklyn factory..4347

TRADE-MARK.

No. 85,910, L. P. Larson, Jr. Co., Mar. 26, 1912.....4348

U. S. LETTERS PATENT.

No. 942,101, A. M. Price, Dec. 7, 1909.....4350
No. 965,598, A. M. Price, July 26, 1910.....4382
No. 968,109, C. Barbieri, Aug. 23, 1919.....4396
No. 968,110, C. Barbieri, Aug. 23, 1910.....4406
No. 992,590, A. M. Price, May 16, 1911.....4410
No. 1,109,461, A. M. Price, Sept. 1, 1914.....4416
No. 1,185,822, A. M. Price, June 6, 1916.....4448

(Vol. I, 1-518; Vol. II, 519-1098; Vol. III, 1099-1596; Vol. IV, 1597-1958; Vol. V, 1959-2444; Vol. VI, 2445-3032; Vol. VII, 3033-3504; Vol. VIII, 3507-3800; Vol. IX, 3801-4059; Vol. X, 4060-4491.)

(Pages 3033 to 3078 of the printed record is a copy of Record No. 2822 in the United States Circuit Court of Appeals in re petition of L. P. Larson Jr. Company for a writ of mandamus, and is inserted pursuant to stipulation of counsel dated January 22, 1926, and filed in the United States District Court on said date.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

October Term, 1919.

In re the Petition of
L. P. Larson Jr. Company. }

To the Honorable, the Judges of said Court:

And now comes the patitioner, the L. P. Larson Jr. Company, and moves the court for leave to file the petition for writ of mandamus hereto annexed, and that upon reading and filing said petition a rule be entered and issue directing the Honorable George A. Carpenter as Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, to show cause why a writ of mandamus should not issue against him in accordance with the prayer of said petition.

CHARLES H. ALDRICH
FRANK F. REED
Solicitors for Petitioner.

Original

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1919.

L. P. Larson Jr. Company, a corporation organized under the laws of the State of Illinois, and which has its pricipal office and place of business in the City of Chicago in said State, respectfully shows to the Court that on the twenty-

seventh day of October, 1911, Wm. Wrigley, Jr. Comapny filed its bill in the then United States Circuit Court for the Northern District of Illinois, Eastern Division, wherein it claimed that the brand of gum manufactured by this petitioner known as "Peptomint" infringed in its dress and color scheme the Spearmint gum manufactured by the Wrigley Company and on November 20, 1911, obtained a temporary restraining order against your petitioner, but took no steps to further prosecute said suit thereafter until your petitioner moved therein in April, 1914, and sought and obtained leave to file an amended answer herein and take depositions in said cause, as will more fully and at large appear by the record on file at this court, No. 2500, October Term, 1916, to which your petitioner begs leave to refer.

II.

That thereafter, in December, 1913, your petitioner put out a brand of gum known as "Wintermint" and applied for the registration thereof on February 3, 1914, which was allowed in April, 1914, by the Commissioner of Patents and final certificate issued in June, 1914; that your petitioner was engaged in introducing said Wintermint brand in the several States of the United States and in foreign commerce as rapidly as the petitioner was able to push the same, when petitioner was advised by the printer who printed the labels of both the Wrigley and your petitioners gums that the Wrigley Company was about to infringe his labels; whereupon the petitioner in writing advised the Wrigley Company that petitioners labels were registered, and warned them against any infringement; whereupon the petitioner was in writing advised by the Wrigley Company that no labels were contained in the letter referred to and requested petitioner to forward the same; whereupon the petitioner under date of June 3, 1914, wrote the Wrigley Company acknowlegding receipt of that company's letter of June 2, 1914, and enclosing both petitioner's Peptomint and Wintermint labels.

III.

Thereafter, to-wit, July 28, 1914, the Wrigley Company brought out its "Doublemint" gum, and with its greater wealth and facilities, already established in several States and foreign countries, proceeded to advertise and push its

sales through its numerous agencies and jobbers and continued this course until June 15, 1915, it filed another bill against your petitioner, in which it alleged in substance that its Doublemint gum antedated your petitioner's Wintermint, and that your petitioner had adopted the dress and color scheme of its Wintermint gum to get the trade of the Wrigley Company, and that they, the Wrigley Company, had "found, as a matter of fact, that the purchasing public makes no distinguishment between the two packages and that the Wintermint gum product of the defendant can be palmed off on the public and trade generally as either the product Spearmint or the product Doublemint of your orator." In this bill the Wrigley Company gave July 28, 1914, as the date of its first sales of "Doublemint" gum.

IV.

Your petitioner fully answered said bill, setting out the facts with regard to the dress of the "Spearmint" gum; that it was not original with the Wrigley Company except as to the arrow, or spearhead appearing on said gum as manufactured and sold by the Wrigley Company, and that the allegations in said bill as to the color scheme and date of use were knowingly false, and that as said complainant Wrigley Company well knew, said dress and color scheme had been used by one Frank F. Pulver and his successor, the Di-Gesto Company, at Rochester, New York, for many years before the Wrigley Company entered upon the manufacture and sale of Spearmint gum, and that said Pulver had sold his spearmint gum so clothed throughout the United States and that said Wrigley Company or its predecessor in business, Wm. Wrigley, Jr. Co., a partnership, had knowingly appropriated said label as it had done with practically every label of every successful manufacturer of gum products in the United States; that the Wrigley Company commenced a suit in 1912, against Frank F. Pulver and the Di-Gesto Company and others in the United States District Court, Southern District of New York, and also in said Court, Western District of New York, in which issue was joined and much evidence taken clearly establishing the Pulver priority, and that in December, 1913, the said Wm. Wrigley Jr. Company bought out the said Pulver and Di-Gesto Company for one hundred thousand dollars in cash and five notes of thirty thousand dollars each, one due on the first of each succeed-

ing January, dismantled said factory and business and caused a decree to be entered in said causes after it, the Wrigley Company, owned and controlled both sides of the litigation, finding that the defendants had infringed the Wrigley trade dress and color scheme and paid and satisfied the damages therefor—all of which the said parties well knew to be false in every particular; and at the same time the Wrigley Company entered into a written agreement with Frank F. Pulver by which Pulver was bound not to disclose the facts to others under penalty of forfeiting the note due in the year of his disclosure:

Wherefore this petitioner averred that the Wrigley Company did not come into court with clean hands. This petitioner also averred in its said answer, as well as in the counterclaim filed at the same time, its earlier dates of manufacture and sale of Wintermint, the written notice given to the Wrigley Company as herein averred, and that it was true that the buying public made no distinguishment as between Wintermint and Doublemint, thus causing confusion in the trade, and prayed both for damages and profits, as well as for general relief. It also denied any wrongdoing or attempt to profit by any imitation of the Wrigley dress or color schemes.

V.

The two suits thus brought against your petitioner by the Wm. Wrigley Jr. Company were by order of court consolidated and brought to hearing together in March, 1917, and after full hearing resulted in the dismissal of both of the bills of the Wrigley Company for want of equity and also the dismissal of your petitioner's counterclaim, whereupon appeals were prosecuted to this court, with the result that this court on June 30, 1918, handed down its opinion herein, affirming the action of the trial court dismissing both the Wrigley bills and reversing such court's action in dismissing this petitioner's counterclaim, and ordering an injunction and accounting in 2498, the second suit brought as aforesaid.

VI.

That upon the trial of said cause in the District Court it was established beyond controversy, that the history given by the Wrigley Company of its Spearmint package was false both as to the colors used and the date of use and that in addition to the infringement after notice and before any sale

of Doublemint, the conduct of said company in the Pulver litigation, the withholding and secretion of the testimony taken in the Pulver case, both from the record of the courts where said suits were pending and also from your petitioner's counsel until compelled to produce it by an order of the District Court, the said Wrigley Company had falsified evidence, resorted to perjured testimony and been guilty of other conduct tending to pollute the administration of justice.

VII.

Therefore upon the hearing in this Court your petitioner's counsel urged that the Wm. Wrigley Jr. Company had been shown to be a wilful and fraudulent infringer, to have wantonly and maliciously attacked your petitioner, first upon a claimed ownership of a stolen package, and then upon a package in which petitioner's priority was fully known to the Wrigley Company, and that in these unjust efforts to crush and throttle your petitioner's business they had committed such crimes against the decent and honest administration of justice as called for the application of the well-known rule that as against such an infringer and only guilty of such conduct he should be deprived of all profits made by him in the manufacture and sale of the infringing article and cited many cases in their brief to sustain such contention, not asking in their said brief anything but profits or other relief, all of which averments of this petition concerning the second case to this point will more fully and at large appear in the record in said cause on file in this court, to which this petitioner begs leave to refer.

VIII.

That the mandate issued from this court July 30, 1918, used the following language:

"On consideration whereof, It is now here ordered, adjudged and decreed by this court that the part of the decree of the said District Court that dismisses the counterclaim of L. P. Larson Jr. Company be, and the same is, hereby reversed with costs; and that this cause be, and the same is, hereby remanded to the said District Court with the direction to enter an injunction and order an accounting."

and upon this being filed, a decree was prepared and entered, a true copy of which is filed herewith marked "Exhibit A", and which your petitioner prays may be considered a part hereof; and thereupon the master to whom said cause was referred entered an order in the words and figures set out

in Exhibit B, which is a true copy of said order and to which this petitioner begs leave to refer, and subsequently the said Wm. Wrigley Jr. Company filed its verified account purporting to be a compliance with the master's order and in which said company claimed to have suffered a loss from the manufacture and sale of Doublemint gum during the accounting period of $286,238.30.

IX.

In this accounting so filed, the Wrigley Company pretended to account for the production and sales to January 1, 1916, from a factory owned by it at the date of the filing of the bill situated in Toronto, Canada, and upon an examination of Wm. Wrigley, Jr. by petitioner's counsel, in the hope of surcharging and falsifying the account so filed, it appeared that the Wm. Wrigley Jr. Company caused a corporation to be organized under the Canadian laws in January, 1916, having two million dollars capital stock, of which $500,000 was preferred stock and $1,500,000 common stock, which corporation was named Wm. Wrigley Jr. Company, Limited and had conveyed all the assets in Canada to such newly organized corporation, taking in payment for such transfer all the capital of said company, both preferred and common; at the time of such examination of Mr. Wrigley the preferred stock was in the treasury of the accounting party the common stock had been distributed as a dividend to the shareholders of the accounting party, and executive officers of the Wrigley Company owned a majority of the stock of the Canadian company and constituted a majority of its Board of Directors and Mr. Wrigley was president thereof.

It was also developed at this examination that the accounting company owned a factory at Sidney, Australia, until in January, 1916, when a corporation was organized under the laws of Australia, to which the factory was conveyed in consideration of all the shares of the Australian Company which the accounting company had in its treasury at the date of the examination except three qualifying shares of one pound each held by the employes conducting the business in Australia; both of the companies so organized in January, 1916, were engaged in manufacturing and selling Doublemint in the infringing dress.

X.

Thereupon your petitioner's solicitors moved the master to extend the accounting to the operations of these two cor-

porations and to direct Wm. Wrigley Jr. Company to file an account thereof. The counsel for the Wrigley Company objected and asked leave to examine L. P. Larson, Jr., President of petitioner, stating that it was proposed to show that your petitioner had either the capital, credit, ability or intenion to extend its business into foreign countries, and over the objection of your petitioner's counsel that such an inquiry was beyond the jurisdiction of the master as not being within the scope of the mandate of this court and the decree entered in said cause, the master permitted the counsel to proceed and required Mr. Larson to take the stand, and your petitioner files herewith as Exhibit C a list of the demands and inquiries made with reference to your petitioner's business, and books which your petitioner prays may be taken as a part of its petition herein.

XI.

That your petitioner finally, under advice of counsel and for the purpose of presenting the question whether such an examination into your petitioner's affairs is within the scope of such reference, refused to answer further questions or produce its books and papers for further examination; whereupon the master certified the same to the court, and his Honor, Judge Carpenter, on March 19th pronounced the opinion, a copy of which is filed herewith marked "Exhibit D" and made a part hereof, and subsequently entered the order a copy of which, marked "Exhibit E" is also made a part of this petition, which rulings by said master and court have the effect of abrogating and nullifying the mandate of this court and the decree entered in said cause.

XII.

Your petitioner is advised by its counsel that no such uncertainty as to the meaning of this court's action and mandate as is implied by the learned pronouncement exists, and that both from the facts before the court when its action was taken, and the accepted legal meaning of the words used, the court did not mean to make the hearing before the master merely an assessment of damages as distinguished from an accounting of profits; that the court's mandate and opinion, followed by a decree directing the master to take an account of all profits accruing to the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress and acquiesced in by all the counsel participating in the discussion of the terms of the decree to be entered

under the mandate, became and is the law of the case, and it is not competent for either the master or the District Court to disobey said mandate and decree, and limit petitioner's right to recover for the infringement of an article but recently put out, and to do so is to annul the mandate of this court and cannot be sought for any legitimate purpose unless the account filed by the Wrigley Company is known to be grossly untrue.

Your petitioner therefore prays that permission be given to file this petition and that the Honorable George A. Carpenter may be directed to show cause why the inquiry before the master should not be limited to the ascertainment of the profits if any, made by the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress as prescribed in the decree, and the mandate of this court in all respects obeyed and carried into execution, and for such other and further relief in the premises as the facts of the case may require.

L. P. LARSON JR. COMPANY
By L. P. LARSON JR.
President.

CHARLES H. ALDRICH
FRANK F. REED
Solicitors for Petitioners.

State of Illinois, } ss.
Cook County, }

I, L. P. LARSON, Jr., on oath state that I have read the above and foregoing petition filed in behalf of the L. P. Larson Jr. Company, and know the contents thereof, and that said petition is true; that I am the president of said corporation and authorized as such to file said petition and verify the same.

L. P. LARSON JR.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 23rd day of March, A. D. 1920.

Witness my hand and notarial seal.

A. G. LOVELESS,
Notary Public.

(Notarial Seal)

My Commission expires October 19, 1923.

EXHIBIT A.

Decree.

(See pp. 515-518, printed record.)

Specimen Complainant's

Exhibit No. 3

Specimen Defendant's and
Counterclaimant's Exhibit No. 2
and Complt's Ex. No. 4.

EXHIBIT B.

The motion of the counterclaimant is sustained, and it is Ordered that:

The Wm. Wrigley Jr. Company furnish and file with the master on or before 4 o'clock in the afternoon of Wednesday, the 30th day of October, 1918, an account in debtor and creditor form, showing the gains and profits of the Wm. Wrigley Jr. Company from July 28, 1914, to the entry of the decree herein, accruing or arising from the manufacture and sale of its Doublemint gum in dress, wrappers or labels identical with or in combination substantially like the dress, wrappers or labels heretofore and now used on the brand of gum of Wm. Wrigley Jr. Company known as "Doublemint," as stated in the decree.

The account should be based upon the books, records and papers of the accounting party, with periodical rests therein to conform with the books as kept and should show the cost, selling price, gains and profits in such manner and in such detail that the correctness of the account may be readily tested by a comparison with the books and records of the accounting party.

EXHIBIT C.

1780 Q. Mr. Larson, will you have here when we next meet a statement showing the sales by the L. P. Larson Jr. Company of Wintermint gum from the date of its inception to November 12, 1918, showing the sales thereof separately by months, and also the date and amount of the first sale of Wintermint gum at each place where it was sold, at the same time specifying the place in each instance.

1781 Mr. Mayer: What we would like to have here by Monday morning, if possible, is the following information, and if we can't have it all by Monday morning, so much

of it as possible, and what I am now saying is not intended to withdraw any request already appearing of record for the production of any books or documents or information.

The monthly sales of all gum by the Zulu Manufacturing Company from the date of its inception to the time it discontinued the gum business, that statement to show separately the monthly sales of wintermint gum
1782 and the monthly sales of Peptomint gum, and also the date and the amount of the first sale of Wintermint gum and the first sale of Peptomint gum at each place where Wintermint gum or Peptomint gum was sold, showing also the place where the first sale was made.

We also want a statement showing the following information with respect to the Zulu Manufacturing Company's advertising of gum, viz., all the places where any advertising was done by that company, the monthly amount spent for advertising in each of said places, the date of the first advertisement in each place, the amount paid therefor and the names and brands advertised in every instance.

We will also want similar information with respect to sales and advertising of all gum by the L. P. Larson Jr. Company from the date of its incorporation up to and including November 12, 1918. We will also want similar information with respect to the sales and advertising of all gum made by L. P. Larson Jr. on his personal, individual, private behalf from July 28, 1911, to and including November 12, 1918.

We would like to have Mr. Larson also produce copies of all advertisements, first of the Zulu Manufacturing Company from the date of its inception to the time it discontinued its gum business, and second, copies of all
1783 advertisements of L. P. Larson Jr. Company from the date of its inception up to and including November 12, 1918.

1785 Mr. Mayer: I want both Mr. Aldrich and the witness to understand I will want them plus all such other books and documents as they have been heretofore requested to produce and which they may be able to get between now and the next session.

1557 Mr. Mayer: Will you produce the books and documents and records which will show all the advertising of Peptomint gum either by yourself as an individual in

your own individual business or on behalf of the L. P. Larson Jr. Company or on behalf of the Zulu Manufacturing Company at any time?

1772 Mr. Mayer: Then I will take the master's course and I will ask you in 1913 did the L. P. Larson Jr. Company sell any gum in California? What's the answer?

1773 Q. Well, can you tell us all the places in which the L. P. Larson Jr. Company made sales of gum during the year 1913 without referring to your books, yes or no?

1797 Q. You were heretofore asked, as appears of record, page 1781 et sequetor, to produce a statement showing in the monthly sales of all gum by the L. P. Larson Jr. Company from the date of its incorporation up to and including November 12, 1918. Have you done so?

1815 Q. That statement, Larson Exhibit 94, does not purport to give any information as to any gum sold by the L. P. Larson Jr. Company prior to December, 1913, is not that so?

A. Yes, sir.

Q. You were asked to produce and prepare a statement showing all sales of all gum by the L. P. Larson Jr. Company from the date of its incorporation up to and including November 12, 1918, That request appears specifically at page 1782 of the record. Have you prepared a statement of all sales of all gum by the L. P. Larson Jr. Company from the date of its incorporation, July, 1911, to December, 1913? What is your answer? Why do you hesitate?

1825 Q. Will you prepare and produce a statement showing all sales by months of all gum by the Zulu Manufacturing Company from the date of its inception to the time it discontinued the gum business, that statement to show separately the monthly sales of Wintermint gum, if any, and the monthly sales of Peptomint gum, if any,

1826 and also the date and the amount of the first sale of Wintermint gum, if any, and of the first sale of Peptomint gum at any place where Wintermint gum or Peptomint gum was sold, showing also the place where the first sale was made; and to guide your memory, let me say that that request is a repetition of the request that appears on pages 1781 and 1782 of the record.

The Master: Now, Mr. Mayer, I don't think I have yet made myself understood. I ruled some time ago that the business of the Zulu Manufacturing Company is too

remote. I wish to stand by that ruling. If, however, there is anything in the books of the Zulu Manufacturing Company that throws light upon the amount of business done by the Larson Company, I think you have a right to the information that those books contain on that subject.

Mr. Mayer: I will reframe the question.

Q. That you produce a statement showing the monthly sales of all gum made by the Zulu Manufacturing Company for or sold by the Zulu Manufacturing Company to the L. P. Larson Jr. Company from the date of the first transaction between those two companies, and let that statement show separately the monthly sales of Wintermint gum by the Zulu Manufacturing Company for the L. P. Larson Jr. Company. Will you do that?

1827 Mr. Mayer: Q. Will you also produce a statement showing all business dealings between the Zulu Manufacturing Company and the L. P. Larson Jr. Company at any time up to and including November 12, 1918?

Mr. Aldrich: We will not produce that unless the master rules we shall. I want something more specific than that, a general dragnet like that I won't submit to.

Mr. Mayer: I want to show what business the L. P. Larson Jr. Company did.

The Master: I think, Mr. Mayer, you are entitled to have the business transactions of the Larson Company with the Zulu Manufacturing Company as well as with an outsider.

1828 Mr. Mayer: Q. Have you prepared any statement showing any advertisement by the Zulu Manufacturing Company of any gum for, on behalf of or on account of the L. P. Larson Jr. Company?

A. No, sir.

Q. I will ask you to prepare and produce such a statement showing also all of the places where any such advertising was done, the nature— * * *

—thereof, the monthly amounts spent for advertising in each of such places, the date of the first advertisement in each place, the amount paid therefor and the names and brands advertised in each instance. Have you such a statement?

1839 Q. Oh, yes. Well, you understand, don't you, that what I want to get is the information which I have already referred to, that is, a statement which will show all the

places where any advertising of any brand of gum was done, either by or for or on behalf of the L. P. Larson Jr. Company and the monthly amount spent for adver-
1840 tising in each of those places and the date of the first advertisement in each place and the amount paid therefor and the names and brands advertised in every instance, and also where you can a copy of the advertisement itself or a photograph of the billboard or whatever it may be.

* * * * * *

Q. Can you now tell us what advertising was done by or for or on behalf of the L. P. Larson Jr. Company of Peptomint gum at any time in 1911?

1846 Q. Well, will you please produce here a copy of the original package of Wintermint gum as it was first produced and also one of the cartons that were first used for putting out Wintermint gum?

1847 Q. Well, will you examine your records and either produce them or a statement showing just what the amount was that was paid out for the first lot of cartons in which the first Wintermint was placed, and also similar information as to the next carton that was used for the sale of Wintermint gum?

1848 Q. You were requested to make a statement showing the monthly sales of Wintermint gum and also the date and amount of the first sale of Wintermint gum at each place where it was sold, indicating also the place of sale, you have not done that, have you?

Mr. Mayer: I would like to have a statement showing
1852 the monthly sales of all gum, showing separately the Wintermint brand, and the Peptomint brands also, showing also the date and the amount of the first sale of Wintermint and of the first sale of Peptomint gum at each place where Wintermint gum or Peptomint gum was sold, showing also the place where the first sale was made.

1967 Q. I am going to ask you, if you will, to produce the inventories of the Zulu Manufacturing Company for the years 1911 and 1912.

2080 Q. I would like to have the statement that you are
2081 going to file as to advertising show the history of the use of these decalcomanias and of these advertisements that you are just referring to, showing when they were made and where, the nature of the advertisements and also the cost and quantity and dates and amounts of payments for these advertisements.

2083 Q. (Continued) I don't ask you to tell the place, but you can tell where you appointed men to do this work and the dates you paid for it and how many of these decalcomanias were made and when they were made and the quantity.

2084 The Master: Have you any books is what I am trying to get at, have you any books that will show what you paid out on account of this particular advertisement?

* * * * * *

The Master: And to a reasonable extent, if he can't get it accurately, of the number of the prints that were actually displayed, that that ought to be sufficient.

2085 Q. The L. P. Larson Jr. Company kept an advertising account at least since January 1, 1913, on its books, did it not?

* * * * * *

Q. And all items of newspaper and other similar advertisements like that of Exhibit 115 went into that account, did they not?

2087 Mr. Mayer: Q. Please prepare a statement showing the history of this booklet, as to when they were first published, how much was paid for them and the quantity thereof and with respect to their distribution.

2089 Mr. Mayer: Q. Another one of these nine advertisements which you brought here purports to be a double postal card, does it not?

* * * * * *

Q. I should like to know how many of those you had made, where, when and who paid for them and where they were sent to.

2095 Q. And please let your reports as to advertising cover that circular, Exhibit 118, I mean as to who made it and when it was made and what quantity there was of it and what distribution was made.

* * * * * *

Q. Did you ever employ any of these addressing institutions to address envelopes for you?

A. Yes, sir.

Q. Will you please prepare yourself to tell us who they were and when they were employed and what lists of addresses they used?

Referring now to Larson Exhibit 119, that is a circular

that advertises both Peptomint gum and Peptomint mints and Wintermints, does it not?

2096 Q. Will you prepare for us a statement of the history of that Exhibit 120, as to how many were prepared and by whom and who paid for them and the extent of their distribution?

2103 Q. Mr. Larson, are there any books and records showing the returns of gum from December, 1913, to August, 1914, either of L. P. Larson Jr. as an individual or as to L. P. Larson Jr. Company or the Zulu Manufacturing Company?

2105 Q. Name all places in the State of Illinois in which any Wintermint gum was sold in December, 1913?

2106 Q. My question is to name all of the cities or towns or villages in the State of Illinois in which any Wintermint gum was sold in December, 1913.

2110 Mr. Mayer: Q. Now, the question I asked you a few minutes ago and which you have not yet answered was, do you say you personally travelled outside of the City of Chicago and sold your Wintermint gum in Illinois outside of Chicago, in December, 1913?

2112 Q. Please produce here the record showing the first sales of Wintermint gum.

* * * * * *

Q. Please produce the record showing the receipt of the cash. Have you made a memorandum?

Q. I don't want you to guess at it, so I will ask you

2113 to go to your records then and prepare this statement that we have been talking about, showing the monthly sales and the other information that has heretofore been called for and especially as indicated at pages 1781 and 1782 of the record.

2116 Q. I will ask you to produce at the next hearing all records showing all gum returned since July 22, 1911, either to L. P. Larson Jr. on account of his own personal, private, individual business or to the L. P. Larson Jr. Company or to the Zulu Manufacturing Company.

2139 Q. Well, will you give me the names please of everybody to whom you paid out any moneys for printing or lithographing work for the Wintermint label at any time and all times?

* * * * * *

Mr. Mayer: Q. I wish you would do that, and I would

also like to have a statement showing the names of everybody to whom you paid out any sums either for advertising Wintermint or for printing any Wintermint labels or cartons or cards or hangers or posters or counterbands or wrappers, showing also the dates of each payment and what the items were for which the payments were made. Have you made a memorandum?

2202 Q. I will ask you to produce your wrapper and label account from July 28, 1911, up to and including November 12, 1918?

* * * * * *

Mr. Mayer: We have to account for profits made because of the wrong we have done him on our theory, and we propose to show that the appearance of our package is entirely different from his.

2211 Mr. Mayer: In other words, what I would like to have would be the following: A statement with monthly rests, showing separately the amounts paid out in the gum business for cartons and for labels and for wrappers by or on behalf of the L. P. Larson Jr. Company from the date of its incorporation up to Novemebr 12, 1918 excluding therefrom the Zulu gum, that is to say, the gum sold under the Zulu brand and used in vending machines and the five stick packages of the gum sold under the brand of Zulu.

2214 Q. Now, what do you know about the duties on export chewing gum into Canada and into Australia since December, 1913?

2229 Q. All right, I would like to have a statement of your stamp account showing the quantities and dates of purchases of those stamps.

Now, in addition to that, was not there a period of time prior to November 12, 1918, when you had to make sworn returns to the United States Government of the gum that you sold?

* * * * * *

The Master: If he has a copy of them or a record from
2321 which he can make a copy, I think it's competent.

Mr. Aldrich: We are objecting to the materiality and
2374 competency and jurisdiction of the master.

The Master: Well, that is the same question, as I understand it, that has been up for discussion before.
2375 If they are entitled to have the information as to these previous sales, they would have a right to get if from the

books of the Larson Company and I have ruled that I will take this testimony. I will overrule the objection and direct that the books requested be produced before the Master tomorrow morning for such use as it may then develop the Wrigley Company has the right to make of them.

Mr. Mayer: Q. If you have any other records that will show whether or not that was paid for and how it was paid for, Mr. Larson, I suggest you bring these records with you.

2378 Q. Now, can you answer the question as to when the second sale of Wintermint gum was made?

EXHIBIT D.

OPINION BY THE COURT.

(See pp. 3032-3036, printed record.)

EXHIBIT E.

ORDER

(See pp. 3036, printed record.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1919.

In re Petition of L. P. Larson, Jr. Company for a writ of mandamus against the Hon. George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.	No. 2822.

RETURN OF GEORGE A. CARPENTER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION THEREOF.

To The Honorable, the Judges of said Circuit Court of Appeals:

In compliance with the order of this Honorable Court to show cause why the prayer of said petitioner should not be granted, the above named respondent hereby respectfully presents and shows:

This is an unfair competition case in which the pleadings and records show the following:

Wm. Wrigley, Jr., Company (herein referred to as Wrigley Co.,) a manufacturer of "Doublemint" chewing gum, filed a bill on June 15, 1915, in the District Court for unfair competition against petitioner, L. P. Larson Jr., Co., (herein referred to as Larson Co.) charging the latter with infringing the color scheme used by the Wrigley Co. on its labels.

On July 6th, 1915, the Larson Co. filed its answer and counter-claim alleging that one Pulver was the originator of the color scheme, that the Wrigley Co. bought out his business and conceled the facts with reference thereto from the court, and that it therefore did not come into court with clean hands; that Larson Company's "Wintermint" gum and label had been on the market for nearly a year and a half before the bill ws filed, and had been extensively advertised and sold throughout the United States for a period of seven months before "Doublemint" gum was marketed; that the

Wrigley Co. introduced its "Doublemint" gum for the deliberate, fraudulent purpose of destroying the Larson Company's business and appropriating it to its own use. The counter-claimant prayed an injunction against the Wrigley Co. and also an accounting for "all profits of every description diverted from this defendant and counter-claimant in the sale of said "Doublemint", or received by said complainant, arising out of said complainant's committment of the infringing acts complained of and account for and pay over all damages that this defendant may have suffered by reason of such infringement and unlawful acts."

Although the bill and answer alleged likelihood of confusion, the Wrigley Company's answer to the counter-claim expressly denied that the public had been misled, or that there had been any confusion between the Doublemint and Wintermint products.

On March 14, 1917, Judge Anderson, on final hearing, dismissed both the bill and counter-claim for want of equity, and he also dismissed a prior suit (heard at the same time) which had been begun by the Wrigley Co. October 27, 1911, against the Larson Co. to enjoin it from using a "Peptomint" chewing gum label alleged to infringe upon plaintiff's "Spearmint" label.

The Wrigley Co. appealed to this court from the decree dismissing its two bills, and the Larson Co. appealed from the decree dismissing its counter-claim.

On July 30, 1918, this court rendered its opinion in both appeals, (253 Federal, 914) holding, in the first suit (involving the "Spearmint" and "Peptomint" labels) that the Wrigley Co. was not entitled to relief because of its concealment of the facts with respect to the purchaser of Pulver's business, and the procuring of an apparently hostile decree against Pulver in December, 1913), which was during the pendency of the first suit. In the second, or instant suit, this court held that the Wrigley Co. was not entitled to relief because its "Doublemint" label was anticipated by about seven months by the Larson Company's "Wintermint" label, and that the Larson Co. should have been granted affirmative relief on its counter-claim against the Wrigley Co.

This court also held that there was a sufficient admission in the pleadings to make it unnecessary for the Larson Co. to offer proof of confusion, and found that there is "a basis for at least the possibility * * * that Larson's diminished sales came from Wrigley's simulation of the 'Winter-

mint' package," but that "in support of the counter-claim no proof was made of actual confusion." It does not appear from the record that there was either admission, or proof that all "Doublemint" sales were deceptive and in fraud of the Larson Company's rights, nor is there anything in the opinion of this court to that effect; and if there had been any such admission made in the pleadings which were filed in 1915, it could not have been found that the Wrigley Company's sales made thereafter, or, at any rate, after the final hearing before Judge Anderson on March 14, 1917, and until the expiration of the accounting period in November, 1918, were fraudulent, or deceptive.

Respondent understands that the only issue in this case which was heard by Judge Anderson, or reviewed by this court, was necessarily the question whether or not the Larson Co. had a valid title to its Wintermint label, and whether the Wrigley Co. was guilty of unfairly competing with the Larson Co. by using the Doublemint label. Until that issue was decided, the question of an accounting could not arise. Consequently, whether the Wrigley Co. should account for profits, or for damages was neither decided nor alluded to by this court, and so it merely reversed the decree dismissing the Larson Company's counter-claim "with the direction to enter an injunction and order an accounting."

In *Racine Engine & Machinery Co.* v. *Confectioners Machinery Co.*, 234 Fed. 876, this Court held that even where it affirms a decree finding defendant guilty of an infringement and directing an accounting, the accounting is still a purely interlocutory matter and is in no manner made final by the affirmance, but remains entirely subject to the District Court until a final decree is entered thereon. In that case, the decree affirmed by this court found defendant guilty of infringement and referred the case to a master for an accounting of defendant's profits which were earned during a specified period. Nevertheless, this court held that the District Court had the power to change the period of time during which the accounting should be taken.

In *Lederer* v. *Garage Equipment Mfg. Co.*, 235 Fed. 527, this court held it could not have been from a decree finding question even if the appeal had been from a decree finding the defendant guilty of infringing and directing an accounting, nor unless and until there has been an accounting had and a final decree entered thereon.

Although the Larson Company's counter-claim charged the

Wrigley Company with wilful and fraudulent misconduct and piracy, and the Larson Co. urged this court to compel the Wrigley Co. to account for all its profits, regardless of the extent of the Larson Company's damages and regardless of whether any of the Doublemint gum was sold to and used only by persons who were not deceived, respondent fails to find anything in this court's opinion upholding any such contention, or even directing an accounting of profits rather than of damages.

The Wrigley Co., prior to the appeal, had no opportunity to be and it was not heard in the District Court in the matter of the accounting, and, as respondent understands, it has not been established, either by the authorities, generally, or by this court as the law of this case, that the Wrigley Co. must account for and pay over to the Larson Co. all profits derived from the sale of Doublemint gum in the enjoined label, and that there may be no deduction from such profits on account of sales to persons who heard of both the Doublemint and Wintermint gums and preferred to chew the former and deliberately selected the same, or that there may be no deduction of profits on account of sales to persons who had never heard of Wintermint gum and received precisely what they intended to buy when they got the Doublemint gum. That such deductions may be permissible, and that evidence of the type in question may be of vital importance, is shown by the authorities cited in the Memorandum of Authorities filed herewith.

The mandate of this court, following its opinion, remanded the case "with the direction to enter an injunction and order an accounting", and did not specify the character of the accounting; it also commanded such further proceedings in the case "as according to right and justice and the laws of the United States ought to be had."

Respondent, regarding the accounting matter an open question, has withheld any order awarding to the Larson Co. any or all the Wrigley Company's profits, if any, and respondent is of the opinion that no award of any kind should be made until all the evidence on the accounting shall have been taken and that the Wrigley Co. should be permitted to make proof of the matters now in controversy, to enable the court to ascertain whether Doublemint gum was sold by the Wrigley Co. in territory which the Larson Co. had not yet entered, or in which it never entered, or intended to enter, and in which it was entirely unknown, and also whether Doublemint

gum was sold to ultimate consumers who were not deceived, but who, either with or without knowledge of Larson's Wintermint gum, deliberately bought the Doublemint gum as the product of the Wrigley Co.

The record also shows that the Larson Co. is seeking an order from the master directing the Wrigley Co. to account for sales and profits made since January 1, 1916, by a Canadian corporation and also by an Australian corporation; that the Wrigley Co. is still offering evidence before the master to prove its claim that those foreign companies were organized in good faith, without any reference to this litigation, because of the claimed impossibility of the Wrigley Co. successfully prosecuting business in those foreign countries on account of heavy duties and war conditions, and that the Wrigley Co. never sold any Doublemint gum to either of those companies, and that they are not branches or agencies of, or dominated by the Wrigley Co.

The Wrigley Co. also claims the right to show that even if those foreign companies should ultimately be held to be its agents, it nevertheless should not be required to account for sales in those countries because it claims that the Larson Co. never had any business, plant or agency and was wholly unknown in those countries, and never intended to enter them, and did not have the credit, equipment or facilities for so doing.

The Master, after argument, ruled that the Wrigley Co. should be allowed to offer the evidence now in controversy, to enable it to segregate its sales and profits due to the infringing label from those due to entirely different causes, and to prove the extent of sales to ultimate consumers who were not deceived, and also to prove what territory was common to both parties.

Thereupon, with the consent of the Larson Co. (subject to its objections) the Wrigley Co. proceeded with its examination of Larson concerning the extent of the Larson Company's business, generally, whether in foreign countries, or in the United States.

On April 17, 1919, L. P. Larson Jr. was called as a witness by the Wrigley Co., and asked questions regarding the extent of the business and advertising of the Larson Co. and also of the Zulu Manufacturing Co. (both of which companies were entirely controlled and virtually owned by L. P. Larson Jr.), and also as to the territory in which those companies sold gum.

Larson had already testified that the Zulu Mfg. Co. had sold gum "all over the world," and also that, before the Wrigley Company put its Doublemint on the market, the Larson Company already had a large business in Wintermint and sold it in almost every state in the United States.

Larson's subsequent examination, however, has already disclosed that prior to the marketing of Doublemint, the Larson Company's sales of Wintermint gum had been very small and had extended over less than half of the States.

Early in his examination, Larson also testified that all the information called for by the Wrigley Co. was contained in books and records which had been preserved and were available, and, he also, from time to time, testified that he was unable to answer questions without those books and records, and that he preferred to examine them before answering and that he was willing to produce them before the Master.

Larson's counsel asked for and obtained adjournment in order to have more time in which to procure the desired information, and at other times he objected to Larson's testifying until the books could be produced. The record shows no effort on the part of the Wrigley Co. to have any records produced, or to examine any of them for any ulterior, or improper purpose.

Larson's recent examination disclosed the fact that the first entry on the Larson Company's account books showing a sale of Wintermint gum was originally entered as a sale of Peptomint gum, and that it has now been altered so as to show a sale of Wintermint gum (by a book-keeper whose name Larson testified he did not recall), and that no such order for the Wintermint gum had, in fact, been received by the Larson Co.

The record also shows that on several recent occasions, while Larson was being examined, he testified that some of his books and records had been stolen. Finally, Larson has now refused to furnish any further information whatsoever before the Master regarding any of the business of the Larson Co., or to produce any books or records, although the Master has directed him to do so.

The records show that Larson is not basing his refusal to testify and produce the records on the ground that he fears he may incriminate himself, or because the information sought is privileged, but he bases his refusal solely on the advice of his counsel.

Upon Larson's refusal to comply with the Master's direction to answer and to produce the Larson Company's records, the Wrigley Company made a motion that respondent order

Larson to comply with the directions of the Master, basing said motion upon a certificate of the Master setting forth his rulings and the evidence and proceedings had before him. The Larson Company thereupon made a counter-motion that Larson's evidence having reference to the history and extent of the business of the Larson Company be stricken from the record as not germane to any inquiry submitted to the Master by respondent's order of October 14, 1918, referring said cause to the Master for an accounting, and a copy of which decree is attached to the petition herein as Exhibit A. Both motions were fully argued before the respondent by counsel for both parties, and after consideration thereof, respondent rendered an opinion, a correct copy of which is attached hereto and marked Exhibit A, and respondent being of the opinion that the Master's rulings were correct, entered an order sustaining the motion of the Wrigley Company directing Larson to answer the questions and produce the books and records referred to, and overruled the Larson Company's motion to strike Larson's testimony from the record, as will appear from the order of respondent, a copy of which is attached to the petition as Exhibit E.

Respondent says that he entered said order because, in his opinion, the same was proper, lawful and in furtherance of justice.

In Exhibit C attached to the petition, many matters are referred to as to which Larson has already given testimony, and respondent attaches hereto as Exhibit B additional extracts from the records and proceedings before the Master.

Respondent respectfully submits to the judgment of this honorable court, and will enter and enforce by proper decree any order or decree made by this honorable court in and about the matters complained of, and respondent respectfully refers to the Memorandum Brief of counsel for the Wrigley Company filed herewith as showing why a writ of mandamus should be denied and paid petition dismissed; and the respondent hereby designates Messrs. Isaac H. Mayer and Wallace R. Lane, of counsel for the Wrigley Company, to present this return and make such argument as may be proper on the order to show cause.

Respectfully submitted

GEORGE A. CARPENTER
Dist. Judge

17th April 1920

EXHIBIT "A"

Opinion by the Court. (See pp. 3032-3036, printed record.)

EXHIBIT B.

Extract From Argument Before Master Morrison, Read in Proceedings Before Respondent.

Apr. 23, 1919. The Master: And it seems to me that the Wrigley Company has a right to know the volume of business, assets, whether in money, property or credit, or whatever the Larson Company possessed, at the beginning, during and at the end of the accounting period and perhaps at any time not too far remote from the accounting period, and that the Wrigley Company would have a right to know where the Larson Company carried on its business and perhaps the volume of its business. It has seemed to me from the beginning that those were the important questions on their theory and that those questions might have been reached and solved much easier than we are solving them. However, as I have said many times, that's a matter for counsel to say.

Mr. Aldrich: I told Your Honor right from the beginning if I had been sitting in your chair, charged with your duty, I would have given them the opportunity to present this evidence to sustain their theory, not that I think there is anything in their theory at all. You understood me when I made that statement.

The Master: Yes. I do not, however, think, counsel has a right to require Mr. Larson to make up tables from his books or do independent work in putting the information in form for use.

Mr. Mayer: I think that objection, if it is made, is good; if that objection is made, I will have something to say on it.

The Master: I think, however, you are entitled to the use of their books for that purpose.

Mr. Mayer: I was going to say if Mr. Larson or Mr. Aldrich thinks that is imposing too large a piece of work—

Mr. Aldrich: I don't think so. If the master desires and you desire this evidence here, I shall try and get it.

Mr. Mayer: Yes, we do wish it, and if it is burdensome either in the sense of taking very much time or very expensive, I will say to the Master that I will ask to have the information procured by the expert Auditor, Mr. Hall, who has already been appointed by the Master, the initial expense thereof to be borne by me.

Mr. Aldrich: I don't think it will be so burdensome and we have not been paring cheese about expense.

EXTRACTS FROM L. P. LARSON JR'S EVIDENCE IN ACCOUNTING RECORD.

1351 Apr. 17, 1919. The Zulu Manufacturing Company was manufacturing and selling gum vending machines.

1352 Larson said he was the active manager, principal stockholder and president of and controlled that Company, It sold chewing gum of a certain size for use in connection with its vending machines. "We had inquiries and orders from all over the world".

1803 May 21, 1919. When witness Larson was asked for the information called for April 25, 1919, (page 1781, showing places in which Wintermint Gum was sold and advertised by the Larson Company), the Master said:

"As I understood you yesterday, Mr. Aldrich, you conceded that they were entitled to this information for a certain specified period."

Mr. Aldrich: "Not waiving my objections to its materiality I said that, if they wanted to present the theory which I had understood Mr. Mayer to expound as his theory of the limits of our recovery, he might need that evidence for the purpose of presenting that theory but

1804 that I didn't think it material or competent evidence for any purpose and I didn't waive that yesterday. * * * I don't think at any period in this case that we can go into an investigation of the L. P. Larson, Jr. Company's affairs on any phase of the question, whether it is the present question of whether this accounting should be

1805 extended to Canada or whether it is upon the final merits of the case. * * * If you have in your mind that, at any time in this case, upon the merits, this evidence should be received, I am not objecting to its reception now, except my broad objection to its materiality and competency for any purpose whatever."

1805 Master rules that testimony should be taken so that court will have it if Wrigley Company's theory be upheld.

1772-3 Apr. 25, 1919. Mr. Mayer asks Larson if he made any sales in 1913 in several designated places, and the witness answered that he did not know, but that there are said records in existence showing that. Mr. Aldrich said:

"I wish to suggest that we will prepare a statement

as soon as we can get time, showing just where and when we sold this gum, the L. P. Larson, Jr., Company, and the amounts, and you can make any argument from it you want and we will verify it, but what is the use of spending time over this?"

Mr. Mayer: "In view of your statement I will not ask any further questions on that. And will you also let that statement show just the date of the first sale at each place.

1173 Mr. Aldrich: "If the books show it, I will, of course I will."

1777-8 Mr. Aldrich says he will furnish the list up to the date of the infringement, and that the information after the infringement "might have some bearing, perhaps, Mr. Mayer, on the question you want to present to the Court."

1852 May 21, 1919. Mr. Mayer asked for information showing different places at which Larson sold Wintermint gum and the date of the first sale at each of those places.

1853 Mr. Mayer: So we can tell when he made his first sale in Boston, when he made his first sale in Chicago, etc.

Q. You understand what is desired?

A. I do.

Q. You have made a memorandum of it have you?

A. You bet.

Q. And you have not got that information here now, have you.

A. No, sir. I will say I have it in part.

2106 May 26, 1919. When Larson was asked to name places in Illinois where Wintermint gum was sold in December, 1913, he said he could not do so without his records.

2107 Witness said he was the General Sales Manager in charge of the Larson Company's business and that he believed that he made some trips in Illinois in December, 1913, to sell Wintermint. He was then asked to examine his books and see if any charge was made for his traveling expenses on any such trip.

2109 After testifying that the first package of Wintermint gum was a cash sale which he made in Chicago, he was asked whether there was any record on his books showing that sale and to examine his books and report.

Thereupon Mr. Aldrich said: "Make a memorandum of it, Mr. Larson."

2107 After saying that he couldn't think of the names of a single place which he visited in Illinois to sell Wintermint gum in December, 1913, outside of Chicago, he said
2111 "I will have to look up and get what information I can before I can answer that question."
2112 When asked as to when the first sale of Wintermint gum was made in certain designated States, the witness said he could not tell without his records.
2113 Q. "Would you be able to tell the city in any States where you made your first sale of Wintermint gum without going to your records."

A. Yes, I know where we sold Wintermint gum, but I would rather refer to my records to have it correct."
2116 May 26, 1919. When asked with regard to returned gum (the exhibited statements of sales not having made any allowance for returned gum), Mr. Aldrich said:

"We will prepare a statement so far as we have records enabling us to do so. Then if they have reason to challenge the accuracy of that statement, we will turn to specific instances when that times comes, * * *"

Mr. Mayer: That will be satisfactory for the present.
1790 May 20, 1919. Larson produces advertising bills.
1792 Says that not all have been produced. When asked
1793 what ones have been excluded, he said:

"There was one campaign on Wintermint throughout the country, but I don't know what has become of that.
1794 I know the agency that did the advertising for us. George Mason did it. I believe it was in the Spring of 1914."

When asked as to the particulars, Mr. Aldrich said: "If there is any necessity of looking that up, we will look it up."

Mr. Mayer: Will you produce the information.

A. I will look it up.

Mr. Aldrich: I asked you to get all that Mr. Larson.
1795 * * * If there are other bills, as Mr. Mayer is interrogating you about, if there are other expenses for advertising, your books should be searched for that and the tabulation should include everything that you have expended for advertising.

A. I would have been glad to do so if I had known it.

Q. Would you rather make out the statement yourself subject to our verification, if we want to verify it.
1796 Mr. Aldrich: Which way do you want to do it?

A. I think best to make up the statement. Then we won't have to take the books over here.

Mr. Mayer: Then I will ask you to do that.

1838 May 21, 1919. In answer to Mr. Mayer's question to produce a statement of advertising, witness says:

"I will produce that which I have a record of, of all advertising of all chewing gum which the L. P. Larson Jr. Company ever made or sold that I can find. I have brought in all I could find up to this time, but there is other advertising, for instance, the advertising that run through the Michigan papers."

1839 The Master: I understand Mr. Larson is willing to make a statement and that he is now getting the information from various sources for that purpose which will cover what you desire.

Q. How long do you think it will take you to make up that statement?

A. Not any time at all. It all depends on what information they (the advertising agencies) can give me.

1876 May 21, 1919. When it appeared that Larson was unable to fix the time of the first bill-board advertising 1877 which he said he had done, he was asked to examine the journal and cash book which he had present.

2066 May 23, 1919. Mr. Mayer asks whether witness has prepared a list showing places where he advertised. Mr. Aldrich refers to information produced as being "all 2067 he has found up to the present time," and that he will furnish all he can find and witness says he is still making an investigation so as to procure all that in- 2068 formation, and "I hope to give it up to you Monday morning."

2195 May 28, 1919. When Mr. Mayer asked witness regarding advertising, Mr. Aldrich said he was over at the factory yesterday, and "I know they are making up a statement of the advertising."

2183 While discussing the production of the books (showing bank accounts) the Master said:

2184 "You are asking here for the production of books. It is not my purpose to turn over those books for a general examination, Mr. Mayer, but what you want is this specific information.

Mr. Mayer: That is all I have asked for in this particular question.

2356-7 Jan. 8, 1920. Mr. Mayer asks for date of first Wintermint" sales and asks Larson to find the date in
2357 his book. Witness confers privately and without permission with Mr. Aldrich, and says he has found the
2358 first sale.

Mr. Aldrich: "You don't want the name of the customer, do you?"

Mr. Mayer: "Leave out the name of the customer and read everything else pertaining to that item."

Witness again confers with Aldrich.

2359 Reads the entry which shows the change from "Pepto" to "Wintermint." Subsequently admits order for Wintermint was never received, but that he had an order from his relative's concern for Peptomint and substituted Wintermint, (2360, 2365, 6, 2376, 7).

2366 Master Rules Wrigley Company has a right to know when the second sale was made in Freemont, Neb., for the purpose of showing that the first sale there was accidental because of family relations, or whether it was part of a series of sales, or of the establishment of business in Freemont.

Mr. Mayer: "When did you make the next Wintermint sale?"

A. "I don't know. I have not got those records in my head."

Q. "Will you please look it up? • • •

Q. "Mr. Larson, what was the date of your second
2369 sale of Wintermint Gum?"

A. "I don't know."

Q. "Will you please examine your journal marked "131" and give us the date."

2378 Shows witness is looking it up.

1567 Apr. 23, 1919. Larson testified that he had the Larson Company's records "from the start of the business, July, 1911."

1797 May 20, 1919. Larson testified that he had not produced certain information (theretofore promised by him), giving as a reason that the records showing his gum sales were "absolutely stolen out of my factory."

On January 7, 1920, Larson testified that on a later oc-
2324 casion, when he came to his office one morning he found his safe had been broken open during the night and the books strewn over the floor. At the same session
2329 the following proceedings occurred:

Master: "Here is the question Mr. Larson, when we took the last adjournment it was understood that you were to produce certain information that had been called for. Much of it was mentioned at the time and I think we all at that time understood about what it was to be. * * *

2330 Now the question is what Mr. Larson and Mr. Aldrich have done to carry out that understand-
2331 ing. * * *

The Master: I want you to produce here tomorrow morning Mr. Larson, everything you have had here on any previous occasion and then if any of it has gone into evidence, we can find that out. That will be the quickest way to get at it, if you will bring everything in. I think also that you should bring in the records which you state show when the first sales of Wintermint were made by your company. I ruled a while ago that you should not be examined or an order made on you to produce those books until you had given an answer. Later along Mr. Lane called attention to that fact that you did give that date and they had a right to know what you base that answer. Are you sure we understand each other?

2334 A. I do. * * *

The Master: Then I suggest Mr. Larson bring here tomorrow all the papers and documents he has had here on previous occasions before the last adjournment, and in addition thereto all such statements or information, if any, that he has procured pursuant to request since the last adjournment.

"Mr. Aldrich: That's all right if the court please."

2345 At the next session, January 8, 1920 Larson was asked whether he had produced the books and documents and prepared the statement which he had theretofore been directed to produce, but he failed to do so.
2350 He admitted, however, that he has books showing all the sales of Wintermint gum and the dates and places of each sale and the names of the purchasers.
2351-3 Thereupon the witness produced his merchandise or sales journal covering January 2, 1913, to March 31, 1914, and said that the entries in that journal were made
2353-4 by a bookkeeper whose name he did not remember.
2356 Larson was then asked the date of the defendant's

first sale of Wintermint gum and after saying it was December, 1913, he said that the journal showed that sale and that he had with him the shipping records of each shipment, which he could examine more easily than the book. While then under examination the witness,
2357 without permission, conferred with his counsel.

Thereupon the following proceedings were had after
2358 the witness testified that the first sale appeared on
2358 page 281, of the journal—

"Q. Will you read the entire item to which you refer?

Mr. Aldrich: You don't want the name of the customer, do you?

Mr. Mayer to the reporter) Will you let the record please show that the witness is again conferring with his counsel before answering the question. • • •

Q. Will you please read everything on that book pertaining to what you say is the first sale of Wintermint gum.

2359 The Master: Except the name of the customer.

Mr. Mayer: Q. Except the name of the customer.

A. 'Fremont, Nebraska, 100 box Pepto.' and two lines scratched through the word Pepto, and the word Wintermint written thereover, '40.00.'

Q. What is the date?

A. December 19, 1913.

Q. Have you finished, Mr. Larson?

A. I think I have.

2372 Larson was then asked whether he would produce the cash book and ledger showing the payment for the first Wintermint sale and as to the bona fides of that transaction and the terms thereof, and when it appeared
2373-4 impossible to procure information from the witness without the cash book and ledger their production was requested, and, over Mr. Aldrich's objection, the Master directed their production "for such use as it may then develop the Wrigley Company has the right
2375 to make of them."

Thereupon, Mr. Mayer asked for the production of any other records that will show whether and how the first order was paid for, and Mr. Aldrich said:

"I want to suggest also that a list be made of the

names of the towns where those first sales were
2375 made."

It also appeared that that first alleged sale was made to a concern which was owned or controlled by Larson's
2365-6 family.

When Larson was asked to produce the order slip he
2376 finally admitted

"that no order therefor had actually ever been received,
2377 but that I took the liberty because of our relations to this concern of shipping them a case of wintermint gum in place of the peptomint gum,"

for which we had an order.

2377 Larson was then asked to produce the order for the peptomint gum and the Master directed its production, Mr. Aldrich saying that the matter would have to first
2377-8 be passed upon by the court

The Master also ruled that the witness should produce
2379 all the records and correspondence pertaining to that alleged order for Peptomint gum which was filled by substituting the Wintermint.

2381 Jan. 9, 1920. Mr. Aldrich said that they have decided "to decline at the present time at least to furnish any more information demanded by opposing counsel in this hearing,"

that they recognize "to the fullest extent" that "as to matters within the Master's jurisdiction all questions should be reserved until the coming in of the Master's report;" that it is his view "that no part of this inquiry into the business of L. P. Larson, Jr. Company is within the jurisdiction of this matter;" and "we therefore say to the Master that we decline to furnish any more information."

2382 Thereupon Mr. Larson was called to the stand and although ordered by the Master to do so he refused even
2383 to produce his cash book and ledger showing payment for the December 13, 1913 order for Wintermint gum which the day before he said he had received from a concern owned principally by his brother-in-law, and
2384 solely on the advise of his counsel the witness declined "to produce any further information" about the Larson Company's business, having expressly stated that the refusal was not upon the ground that the in-
2384-5 formation might tend to incriminate himself.

The refusal was then made so broad as to cover the
2386 furnishing of "any information," or the production of any records or documents, "which information, documents, records and books the Master has ruled should be properly furnished here." (2386)
2387 Thereupon the Master directed the witness
"to produce here for use on this hearing the books and records and papers that the Master has heretofore directed you to produce,"
and the witness, saying it was not because of fear of incrimination (and not claiming any betrayal of trade secrets) but solely because of counsel's advice, refused
2387-8 to comply with such directions, and for like reasons only, the witness persisted in his refusal to answer questions, notwithstanding the Master's directions to him to
2388 do so.

(Endorsed) In the U. S. Circuit Court of Appeals. Seventh Dist. In Re Petition of L. P. Larson, Jr. Company for a writ of Mandamus against the Hon. Geo. A. Carpenter, Judge of Dist. Ct. of U. S., etc.—Return of George A. Carpenter, Judge of Dist. Ct., etc. Filed Apr 19 1920 Edward M. Holloway, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

October Term, 1919.

In re The Petition of L. P. Larson Jr. Company for a writ of mandamus against the Honorable George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.	No. 2922.

To Isaac H. Mayer and Wallace R. Lane, Esqs., Solicitors for Wrigley Jr. Company and George A. Carpenter, District Judge:

We hand you herewith copy of an affidavit of L. P. Larson, Jr., filed this day in the office of the Clerk of the United

States Circuit Court of Appeals, in answer to the return of Honorable George A. Carpenter in the above entitled cause.

CHARLES H. ALDRICH,
FRANK F. REED,
Solrs. for L. P. Larson Jr. Co.

Received a copy of the above and foregoing notice and affidavit, this 24th day of April A. D. 1920.

MAYER, MEYER, AUSTRIAN & PLATT,
GEO. A. CARPENTER,
WALLACE R. LANE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

October Term, 1919.

In re Petition of L. P. Larson Jr. Company for a Writ of Mandamus against the Honorable George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.	No. 2822.

L. P. Larson, Jr. on oath says that he files this reply to the return of George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, thereof, for the purpose of correcting some inaccuracies contained therein and supplying certain omissions therefrom which the learned court was doubtless unaware of and concerning which probably was not advised by the counsel whom he has designated herein to represent him, and who since the withdrawal of Mr. James R. Offield have and still do represent the Wm. Wrigley Jr. Company herein.

1. It is not accurate to state, as the respondent does, that the bill alleged simply that there was a likelihood of confusion between the Wintermint gum on one side and the Spearmint and Doublemint gums on the other side. What the bill of the Wrigley Company actually averred was that the plaintiffs had found "as a matter of fact, that the purchasing public makes no distinguishment between the two packages and that the Wintermint gum product of the defendant

can be palmed off on the public and trade generally as either the product Spearmint or the product Doublemint of your orator." (Original Record, p. 42.)

The Larson Company admitted these averments and the evidence given by Wm. Wrigley, Jr. and A. G. Cox tended to sustain the fact of confusion.

2. It is said in the return that the answer to the counterclaim denied the fact of confusion. There was no effort on the part of the Wrigley Company to sustain such denial by proof, and this affiant was advised by his counsel that the trial court would doubtless hold, if such an effort were made, that the Wrigley Company could not thus attack the foundations of the original bill.

3. Nor is it accurate to state that this court affirmed the dismissal of the first suit "because of its concealment of the facts with respect to the purchase of Pulver's business and the procuring of an apparently hostile decree against Pulver in December, 1913," and that "in the second, or instant, suit this court held that the Wrigley Company was not entitled to relief because its "Doublemint" label was anticipated by about seven months by the Larson Company's "Wintermint" label."

This court held as quoted, but it had before it a record which established beyond reasonable contradiction.

a. That the history given in both bills of the history date and times of use, origination of the alleged collor scheme upon which the right of recovery in both cases was predicated, was false in every essential respect.

b. No Spearmint gum was manufactured by the Wrigley Company in 1892 or 1893, nor at any time prior to 1902, when a small amount was manufactured and sold; its manufacture was discontinued until late in 1906 or beginning of 1907, when it was again begun.

c. The gum was not clothed in the color scheme described in both bills, until late in 1906; the pink wrappers for the individual sticks being then first used, as admitted by Mr. Wrigley in answer to interrogatories (Original Record 68) and by Mr. Offield in his brief.

d. The record also showed the withholding of the evidence taken in the Pulver case and a false statement to counsel of the Larson Company concerning the same upon the record.

e. It also showed a contract with Pulver clearly tending to suppress evidence or induce false evidence and as such against public policy.

f. It also showed that after owning both sides of the Pulver controversy, they made the records of the courts speak falsely.

g. Also that the evidence given upon the stand in this suit that because of a fire in the Zeno factory on December 31, 1904, the records showing the manufacture of Spearmint gum for the Wrigley Company in the wrappings described in both bills were destroyed, was knowingly and corruptly false. The records were in fact only wet by the water. The sales records were not even wet or damaged. And finally, J. C. Cox, an officer of the Zeno Company at the date of the fire, and at the date of his going upon the witness stand the treasurer of the Wrigley Company, testified that copies of the books damaged had been made and the originals destroyed by them. (Original Record, 170-171).

h. It clearly appeared in the record that the Wrigley Company had never originated the color scheme described in both bills, but had appropriated it bodily from the Pulver and Di-Gesto labels, and that its averments as to the origination of this color scheme were false.

i. The record showed that the Wrigley Company throughout its history had had an unfortunate habit of appropriating the brands and color schemes of other competing manufacturers. Mr. Wrigley was examined with the chart of the appropriated brands and admitted that he was not the first to use pink wrappers and that he followed certain brands shown by the chart (Original Record 86).

j. The record shows that this affiant was advised before any sale of Doublemint of the intention of the Wrigley Company to infringe the labels of the Larson Company and wrote his warning letter on May 29, 1914; he was asked to send the labels referred to in his letter under date of June 2, 1914, which he answered June 3, 1914, in which he enclosed both his Wintermint and Peptomint labels.

k. The learned respondent quotes a part of the prayer for relief in the counterclaim, but neglects to state that there was also a prayer for general relief.

Affiant states that he was advised by his counsel that in view of the fact that the Wrigley Company had its agencies in all parts of the United States and in foreign countries, and could and had from the date of the first sale of its Doublemint gum on July 28, 1914, doubtless anticipated his market for Wintermint, which had been on sale by him only about

seven months, and also by reason of the conduct of the Wrigley Company in the trial of said consolidated causes tending to bring into disrepute the honest administration of justice, to abandon in this court all other claims except only the profits of the Wrigley Company because of its wilful, fraudulent and malicious infringement, and he is advised that his counsel so did, and begs leave to refer to the briefs filed in this cause in support of this statement. That when this court filed its opinion and issued its mandate to the District Court, this affiant was advised by his counsel that the right of the Larson Company to all the profits made by the Wrigley Company in the manufacture and sale of Doublemint gum in the infringing dress, wherever manufactured and sold, had under the facts of this case and in part recited above, been established and had become the law of the case, and the Larson Company has at great expense been seeking to establish that profits were made by the Wrigley Company, and that its account by which it claimed to have suffered a loss of $286,-238.30, was false and untrue.

That counsel for the Wrigley Company so understood this court's action, is shown by the following facts:

When the counsel for the contending parties first met, Mr. Offield contended that the accounting was limited to the few months because the sealed wrapper was not used until in the Autumn of 1915, and such wrapper made a change in the package which, as he claimed, was the subject matter of the litigation. This attempt to substitute a bogus package and which was exposed to this court at the time, led to the withdrawal of Mr. Offield from the case, as he has never appeared therein since said date; then the new counsel for the Wrigley Company submitted to the learned respondent, as did also counsel for the Larson Company, drafts of proposed decrees. And affiant submits herewith, marked "Larson Exhibit 1" and "Larson Exhibit 2," two drafts of proposed decrees submitted by counsel for the Wrigley Company, and the Court's attention is directed to the fact that in both said drafts it is provided that the Larson Company shall have an accounting of "all the gains and profits which have accrued to said Wm. Wrigley Jr. Company by reason of the commission of the acts hereinbefore enjoined."

The learned respondent, with these decrees before him entered the one set out in the petition herewith filed, which was prepared by counsel for the Larson Company in the main

but embodies some modifications sought and obtained by counsel for the Wrigley Company.

Again, when the parties were before the Master and there was under discussion the question of the time when the Wrigley Company should file its accounting under the order of the Master, which had followed in its terms the language of the decree as entered by the learned District Judge, Mr. Mayer of counsel for the Wrigley Company said "I stated at my first appearance, and I repeat it, that there is no disposition and will be no disposition on the part of Wm. Wrigley Jr. Company to withhold anything and an absolutely accurate, full, detailed and proper account of this business and the profits made from Doublemint will be made. That's what the court has ordered, that's what on the face of the record we are assuming the other side are entitled to, and they shall have it as speedily as it is humanly possible."

Attention has been called to a similar statement made by Mr. Mayer at the time he filed the account.

Affiant further states that so far as he has been advised nothing has occurred in court or within his knowledge to justify any other interpretation of this court's mandate and opinion; and affiant further states that the court's statement that it "does not appear from the record that there was either admission or proof that all Doublemint sales were deceptive and in fraud of the Larson Company's rights, nor is there anything in the court's opinion to that effect; and if there had been any such admission made in the pleadings which were filed in 1915, it could not have been found that the Wrigley Company sales made thereafter or, at any rate, after the final hearing before Judge Anderson on March 14, 1917, and until the expiration of the accounting period in November, 1918, were fraudulent or deceptive" is, as he is advised in direct conflict with the mandate of this court, which was necessarily based upon the assumption that the Wrigley Company was a wilful and malicious infringer and had been guilty of such conduct in the conduct of this litigation and in connection therewith, calculated to bring the administration of justice into disrepute, as called for the application of the "more drastic rule" using the words of the respondent in the opinion pronounced by him on this hearing, and which was also adopted by him when he entered the decree under which the hearings before the master are supposedly to be conducted.

With reference to the respondent's statement that the Ca-

nadian and Australian companies are not branches, or agents of, or dominated by the Wrigley Company, or that the Wrigley Company seeks so to prove, affiant produces and files herewith a statement made by Wm. Wrigley, Jr. when upon the stand, being Larson Exhibit No. 18 in the record before the Master, pp. 284a, 284b and 284c, showing the stockholders in the three companies, and the officers and directors thereof, and by which it appears that the statement made is without foundation in fact.

That affiant does not understand the statement made in the return that the examination of this affiant and the affairs of the Larson Company was "with the consent of the Larson Company" subject to its objections. Certain it is that at all times counsel for the Larson Company objected on the ground that such examination was beyond the jurisdiction of the master, being outside anything contained in the decree entered under this court's mandate, and hence incompetent and immaterial.

When the master ruled against this contention, this affiant endeavored to comply with the master's rulings at all times, under the understanding that all objections were preserved and were to be preserved as to each and every question without repetition.

And this affiant produces and files herewith a table prepared and made a part of the record in this case under the restrictions last stated, as to the States in which he had sold Wintermint gum prior to the sale by the Wrigley Company of its Doublemint gum, and makes the same "Larson Exhibit 4" and a part of his reply herein, and particularly the statement that its sales had extended over less than half of the States. It is true that the sales had not been large, but the difficulties of the Larson Company have been great, because the largest manufacturer of gum in the world, the Wrigley Company, first sues it upon a stolen package and procures a restraining order; then sues upon a package where it had been warned of the Larson Company's priority and furnished with samples of its labels before the Doublemint package was put upon the market; and then, in the prosecution of its suits against the Larson Company resorts to such tactics as have been set out and established in this record and referred to above.

When to this conduct now in the record there is added the further fact that the Wrigley Company has sought to ter-

rorize its customers, and corrupt its employes, it seems to this affiant that the Larson Company may be forgiven for being small, a fact referred to by the respondent.

It is true that affiant testified that all the information called for by the Wrigley Company was contained in books and records which had been preserved and were available, and at that time affiant believed that such was the fact, as he had taken pains to preserve all records, as he believed, as he regarded them as of the greatest importance in other litigation with the Wrigley Company; that he was, when he afterwards sought for the books and records, unable to find them, and believes they have been stolen; how a court could make these facts the subject of comment in a return of this character, in view of the record made by the Wrigley Company in this cause, and the obvious interest of the Wrigley Company to have the books missing, and the obvious interest of affiant and the Larson Company to have the books in their possession, is hard to understand.

And affiant says that he has never concealed, destroyed, or in any way held back any evidence or information within his knowledge, nor has he done any other act herein to withhold or change any proof so as to give a false appearance to anything connected with this litigation; that he refused to further testify wholly under advice of his counsel, who told him that both legal and business reasons made it proper and right for him to do so, and then only after he had been advised by the Wrigley interests that if he did not drop this suit he would be injured in reputation and would have to spend ten years more in litigation; that affiant would not state these facts if the unwarranted and unjust insinuations against this affiant's conduct had not been,—inadvertently as this affiant hopes,—included in the return made by the District Judge.

That affiant was advised by his counsel that in view of the account as stated by the Wrigley Company, in which a loss on the manufacture and sale of Doublemint during the infringing period, of $286,238.30 was claimed, and the fact that in this court they had only claimed profits and the mandate and decree only referred thereto; that this minute examination of the affairs of the Larson Company could only be sought for illegitimate purposes, and that a halt should be called, and he therefore refused to further answer or furnish informa-

tion solely because of the advice of his counsel and relying thereon and with no wish to be in contempt of court.

And further affiant saith not.

L. P. LARSON JR.

Subscribed and sworn to before me, this 24th day of April, A. D. 1920.

A. G. LOVELESS,
Notary Public.

(Seal)

Exhibit 1.

EXHIBIT 1

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Wm. Wrigley Jr. Company,
Complainant,
vs.
L. P. Larson Jr. Company,
Defendant and Counterclaimant.
} No. 448.

Decree.

The defendant and counterclaimant, L. P. Larson, Jr. Company, having appealed to the United States Circuit Court of Appeals for the Seventh Circuit from the decree of this Court herein of the 14th of March, 1917, dismissing the said counterclaim for want of equity, and the complainant herein, Wm. Wrigley Jr. Company, having appealed from the decree of this Court of the same date, dismissing the bill of complaint for want of equity, and the said United States Circuit Court of Appeals having heard said appeals and having reversed that part of the decree dismissing said counterclaim, with directions to enter an injunction and order an accounting, and the mandate of said Court to said effect having been issued and filed herein.

Now, Therefore, pursuant to said mandate, it is Ordered, Adjudged and Decreed:

First: That so much of the aforesaid decree as dismisses the said counterclaim be set aside and, in lieu thereof, it be,

and hereby is, ordered, adjudged and decreed that Wm. Wrigley Jr. Company, complainant herein, its officers attorneys, servants and agents, be, and hereby are, enjoined and restrained, so long as L. P. Larson Jr. Company, counterclaimant herein, or its successors in business, shall continue to make or sell packages of gum substantially similar in material respects to the Larson Wintermint package, Exhibit No. 4 hereinafter mentioned, from putting up, selling or offering for sale, gum in packages corresponding to Complainant's Exhibit No. 3 of the bill of complaint (of which a duplicate is filed herewith so marked), or substantially identical thereto, in respect to any coloring, marking or printing, by which the said Larson Wintermint, Exhibit No. 4 of the bill of complaint (of which a duplicate is filed herewith marked "Exhibit No. 4"), is distinguished from complainant's Spearmint package, Exhibit No. 2 of the bill of complaint (of which a duplicate is filed herewith, marked "Exhibit No. 2"), and from simulating or imitating in such respects the said Larson Wintermint package, Exhibit No. 4; it being understood that nothing herein shall prevent the said Wrigley Jr. Company from putting up, selling or offering for sale, packages having labels, wrappers, coloring or marking, substantially similar to the said Wrigley Spearmint packages in evidence as Exhibit No. 2; providing, also, that said Wm. Wrigley Jr. Company may have a period of ninety days from the entry of this decree before it is compelled to make changes in advertisements already out and such changes in its packages as necessary to conform to this decree, the injunction being to this extent suspended during such ninety days.

Second: That this cause be referred to Charles B. Morrison, one of the Masters of this Court, to take an account of all the gains and profits which have accrued to said Wm. Wrigley Jr. Company by reason of the commission of the acts hereinbefore enjoined, from and since the date of filing the counterclaim herein, including any such gains or profits as may be made by the commission of such acts during the before mentioned suspension of the injunction.

Third: That the said Master shall have the powers conferred by rule 62nd of the Supreme Court of Equity.

.....

Judge.

Exhibit 2.

EXHIBIT 2.

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

Wm. Wrigley Jr. Company,
Complainant,
vs.
L. P. Larson Jr. Company,
Defendant and Counterclaimant.
} No. 488.

Decree.

The defendant and counterclaimant, L. P. Larson Jr. Company, having appealed to the United States Circuit Court of Appeals for the Seventh Circuit from the decree of this Court herein of the 14th of March, 1917, dismissing the said counterclaim for want of equity, and the complainant herein, Wm. Wrigley Jr. Company, having appealed from the decree of this Court of the same date, dismissing the bill of complaint for want of equity, and the said United States Circuit Court of Appeals having heard said appeals, adjudged and decreed that said decree dismissing the bill of the Wm. Wrigley Jr. Company was right and just and having reversed that part of the decree dismissing said counterclaim, with directions to enter an injunction and order an accounting, and the mandate of said Court to said effect having been issued and filed herein.

Now, Therefore, pursuant to said mandate, it appearing that the Exhibit No. 2, No. 3 and No. 4, hereto attached are, respectively, identical with complainant's exhibits of corresponding numbers attached to the bill, and that "Specimen Complainant's Exhibit No. 3," hereto attached, is identical with an exhibit introduced at the trial of the case before the Court of Appeals, representing complainant's Doublemint package made and sold during the pendency of this suit, used to replace said first-mentioned Exhibit No. 3 which had disappeared before the hearing in the District Court, it being then stated by complainant's counsel that the exhibit corresponded with the original Exhibit No. 3 except that the green wax paper covering at the ends of the wrappers

had been added after the bill was filed, it is Ordered, Adjudged and Decreed:

First: That so much of the aforesaid decree as dismisses the said counterclaim be set aside and, in lieu thereof, it be and hereby is, ordered, adjudged and decreed that Wm. Wrigley Jr. Company, complainant herein, its officers, attorneys, servants and agents, be, and hereby are, enjoined and restrained (so long as L. P. Larson Jr. Company, counterclaimant herein, or its successors in business, shall continue to make or sell packages of gum substantially similar in material respects to the Larson Wintermint package, Exhibit No. 4, hereto attached) from putting up, selling or offering for sale, gum in packages corresponding to Complainant's Specimen Exhibit No. 3 aforesaid, or substantially identical thereto, in respect to coloring, marking or printing, by which the said Larson Wintermint, Exhibit No. 4 of the bill of complaint is distinguished from said complainant's Spearmint package, Exhibit No. 2 of the bill of complaint, and from simulating or imitating in such respects the said Larson Wintermint package, Exhibit No. 4; it being understood that nothing herein shall prevent the said Wm. Wrigley Jr. Company from putting up, selling or offereing for sale, packages having labels, wrappers, coloring or marking, substantially similar to the said Wrigley Spearmint packages in evidence as Exhibit No. 2; providing, also, that said Wm. Wrigley Jr. Company may have a period of ninety days from the entry of this decree before it is compelled to make changes in advertise ments already out and such changes in its packages as necessary to conform to this decree, the injunction being to this extent suspended during such ninety days.

Second: That this cause be referred to Charles B. Morrison, one of the Masters of this Court, to take an account of all the gains and profits which have accrued to said Wm. Wrigley Jr. Company by reason of the commission of the acts hereinbefore enjoined, from and since the date of filing the counterclaim herein, including any such gains or profits as may be made by the commission of such acts during the before mentioned suspension of the injunction.

Third: That the said Master shall have the powers conferred by rule 62nd of the Supreme Court in Equity.

.....

Judge.

.....	.....
Exhibit No. 2	Exhibit No. 3
.....	.....
Exhibit No. 4	Specimen Complainants Exh. No. 3

(See pp. 588-590, printed record.)

EXHIBIT 4.

INITIAL SALES OF WINTERMINT GUM BY STATES during the period from DECEMBER 1913 to AUGUST 1914— inclusive.

1913	1914						
December	January	February	March	April	May	June	July
Nebr.	Ark.	Ga.	N. Dak.	Tex.	Okla.	N. Mex.	Colo.
Ill.	Miss.	Ky.	Mich.	La.	Ky.		
	Va.	Mo.	Me.		Wis.		
	Wash.	Ind.					
	N. C.	Ia.					
	Tenn.	Mont.					
	Ala.	Minn.					
		S. Dak.					
		Kas.					
		Fla.					

Record Page 2100.

(Endorsed) 2822 L. P. Larson Jr. Co vs Wm Wrigley Jr Co Notice and Affidavit of L. P. Larson Filed Apr 23 1920 Edward M. Holloway, Clerk.

250 And on to-wit: the 26th day of Sept. 1921, there was filed in the Clerk's office of said court a certain Mandate, in words and figures following to-wit: Filed Sept. 26, 1921.

251 United States of America } ss.

The President of the United States of America, To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division. Greeting:

(Seal)

Whereas, lately in the District Court of the United States for the Northern District of Illinois, before you, or some of you, in a cause between Wm. Wrigley Jr. Company, Complainant and L. P. Larson Jr. Company, the order or decree entered on the twenty-second day of March, 1920, is in the words and figures following, to-wit:

This cause having come on for hearing before this court upon the motion of said Wm. Wrigley Jr. Company to compel the witness, L. P. Larson Jr. now on the stand in the accounting proceeding before Master Charles B. Morrison, to whom this case was referred by this court, to answer the questions heretofore propounded to him, and to produce for use and furnish before the Master the information, books, documents and records requested of him by counsel for said Wm. Wrigley Jr. Company, which the said master has directed said Larson to answer, produce and furnish, and particularly as shown by the record now before the court, certified by the Master; and also upon the motion of said L. P. Larson, Jr., that the evidence of said L. P. Larson, Jr., heretofore taken in this cause having reference to the history and extent of the business of said L. P. Larson, Jr., Company, be stricken from the record as not germane in any inquiry submitted to the Master under the terms of the decree entered in this cause October 14, 1918, referring said cause to said Master, and said motions having been fully argued by Charles H. Aldrich and Frank F. Reed, for the L. P. Larson Jr. Company and by Isaac H. Mayer and Wallace R. Lane, for the Wm. Wrigley Jr. Company:

Now upon due consideration thereof, it is hereby Ordered,

First: That said motion of the Wm. Wrigley Jr. Company

to compel the witness, L. P. Larson Jr., to answer the questions referred to in said motion, be and the same is hereby granted, and said witness is further ordered to answer said questions and also further questions as may be required by the Master, and also to produce, for use and furnish before the Master the information, books, documents and records referred to in said motion, and also such further information, books, documents and records as may be required by the Master.

Second: It is further ordered that the said motion of the said L. P. Larson Jr. Company, to strike from the record the evidence of said L. P. Larson, Jr. heretofore taken in this cause having reference to the history and extent of the business of said L. P. Larson Jr. Company, as not germane to any inquiry submitted to the Master under the terms of said decree in this cause, be and the same is hereby overruled and denied.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

252 And Whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit, on the said transcript of record and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this court that the order or decree of the said District Court in this cause appealed from, be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with instructions to enter an order directing the Master to proceed with the accounting in accordance with the opinion of this court.

Thursday, March 31, 1921.

And afterwards, to-wit: On the thirtieth day of April, 1921, the was filed in the office of the clerk of this court a certain Petition for a Rehearing, which said Petition for a Rehearing was, on the twentieth day of July, 1921, overruled.

And further that the appellant, L. P. Larson Jr. Company, recover against the appellee, William Wrigley Jr. Company, the sum of One Hundred Seventy-six and 30/100 Dollars

($176.30) for its costs herein expended with direction to award the execution therefor.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Order or Decree notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-first day of July in the year of our Lord one thousand nine hundred and twenty-one.

EDWARD M. HOLLOWAY
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Endorsed) 488 United States Circuit Court of Appeals, Seventh Circuit, No. 2831. October Term, 192 . L. P. Larson Jr. Company, Appellant. vs. William Wrigley Jr. Company, Appellee. Mandate Filed Sep. 26, 1921 at..... O'clock.....M: John H. R. Jamar, Clerk.

253 Office of the Clerk, United States Circuit Court of Appeals at Chicago, William Wrigley Jr. Company to Edward M. Holloway, Clerk, Dr.

BILL OF COSTS

In Cause No. 2831 { L. P. Larson Jr. Co. *vs.* William Wrigley Jr. Co. } October Term, 1921

	Cost of each item	
Docketing a case and filing the record	$5 00	$ 5 00
Entering an appearance	25	1 00
Transferring a case to the printed calendar	1 00	
Entering a continuance	25	
Filing a motion, order, or other paper	25	6 00
Entering any rule, or making or copying any record or any other paper, for each one hundred words	20	1 00
Argument	20	20
Order	20	80
Entering a judgment or decree	1 00	1 00
Every search of the record of the court and certifying the same	1 00	
Affixing a certificate and a seal to any paper	1 00	
Receiving, keeping, and paying money, in pursuance of any statute or order of court one per cent on the amount so received, kept, and paid		
Preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index	25	18 00
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20	
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00	5 00
Filing briefs for each party appearing	5 00	15 00
Attorney's docket fee	20 00	20 00
Cost of printing record		103 30
Cost of patent sheets for record		
		$176 30

Paid .....

Balance due .....

Received payment ....., 192

.....

Clerk, United States Circuit Court of Appeals for the Seventh Circuit.

482 And on to-wit: on the 24th day of January, 1924, there was filed in the Clerk's Office of said Court a certain Mandate in words and figures following, to-wit: Filed Jan. 24, 1924.

483 United States of America } ss

The president of the United States of America, To the Honorable George A. Carpenter, United States District Judge for the Northern District of Illinois, Eastern Division. Greeting:

(Seal)

Whereas, lately in the United States Circuit Court of Appeals for the Seventh Circuit, the L. P. Larson Jr. Company by its counsel, filed its certain petition for a writ of Mandamus to be directed to Honorable George A. Carpenter, United States District Judge for the Northern District of Illinois, Eastern Division, which said petition is in the following words and figures, to-wit:

484 L. P. Larson Jr. Company, a corporation organized under the laws of the State of Illinois, and which has its principal office and place of business in the City of Chicago in said State, respectfully shows to the Court that on the twenty-seventh day of October, 1911, Wm. Wrigley Jr. Company filed its bill in the then United States Circuit Court for the Northern District of Illinois, Eastern Division, wherein it claimed that the brand of gum manufactured by this petitioner known as "Peptomint" infringed in its dress and color scheme the Spearmint gum manufactured by the Wrigley Company and on November 20, 1911, obtained a temporary restraining order against your petitioner, but took no steps to further prosecute said suit thereafter until your petitioner moved therein in April, 1914, and sought and obtained leave to file an amended answer herein and take depositions in said cause, as will more fully and at large appear by the record on file in this court, No. 2500, October Term, 1916, to which your petitioner begs leave to refer.

II.

That thereafter, in December, 1913, your petitioner put out a brand of gum known as "Wintermint" and applied for the registration thereof on February 3, 1914, which was allowed in April, 1914, by the Commissioner of Patents and a final certificate issued in June, 1914; that your petitioner was engaged in introducing said Wintermint brand in the several States of the United States and in foreign commerce as rapidly as the petitioner was able to push the same when petitioner was advised by the printer who printed the labels of both the Wrigley and your petitioner's gums that the Wrigley Company was about to infringe his labels; whereupon the petitioner in writing advised the Wrigley Company that petitioner's labels were registered, and warned them against any infringement; whereupon the petitioner was in writing advised by the Wrigley Company that no labels
485 were contained in the letter referred to and requested petitioner to forward the same; whereupon the petitioner under date of June 3, 1914, wrote the Wrigley Company acknowledging receipt of that company's letter of June 2, 1914, and enclosing both petitioner's Peptomint and Wintermint labels.

III.

Thereafter, to-wit, July 28, 1914, the Wrigley Company brought out its "Doublemint" gum, and with its greater wealth and facilities, already established in the several States and foreign countries, proceeded to advertise and push its sales through its numerous agencies and jobbers and contined this course until June 15, 1915, it filed another bill against your petitioner, in which it alleged in substance that its Doublemint gum antedated your petitioner's Wintermint, and that your petitioner had adopted the dress and color scheme of its Wintermint gum to get the trade of the Wrigley Company, and that they, the Wrigley Company, had "found, as a matter of fact, that the purchasing public makes no distinguishment between the two packages and that the Wintermint gum product of the defendant can be palmed off on the public and trade generally as either the product Spearmint or the product Doublemint of your orator." In this bill the Wrigley Company gave July 28, 1914, as the date of its first sale of "Doublemint" gum.

IV.

Your petitioner fully answered said bill, setting out the facts with regard to the dress of the "Spearmint" gum; that it was not original with the Wrigley Company except as to the arrow, or spearhead appearing on said gum as manufactured and sold by the Wrigley Company, and that the allegations in said bill as to the color scheme and the
486 date of use were knowingly false, and that as said complainant Wrigley Company well knew, said dress and color scheme had been used by one Frank F. Pulver and his successor, the Di-Gesto Company, at Rochester, New York, for many years before the Wrigley Company entered upon the manufacture and sale of Spearmint gum, and that said Pulver had sold his spearmint gum so clothed throughout the United States and that said Wrigley Company or its predecessor in business, Wm. Wrigley, Jr. Co., a partnership, had knowingly appropriated said label as it had done with practically every label of every successful manufacturer of gum products in the United States; that the Wrigley Company commenced a suit in 1912, against Frank F. Pulver and the Di-Gesto Company and others in the United States District Court, Southern District of New York, and also in said court, Western District of New York, in which issue was joined and much evidence taken clearly establishing the Pulver Priority, and that in December, 1913, the said Wm. Wrigley Jr. Company bought out the said Pulver and Di-Gesto Company for one hundred thousand dollars in cash and five notes of thirty thousand dollars each, one due on the first of each succeeding January, dismantled said factory and business and caused a decree to be entered in said causes after it, the Wrigley Company, owned and controlled both sides of the litigation, finding that the defendants had infringed the Wrigley trade dress and color scheme and paid and satisfied the damages therefor,—all of which the said parties well knew to be false in every particular; and at the same time the Wrigley Company entered into a written agreement with Frank F. Pulver by which Pulver was bound not to disclose the facts to others under penalty of forfeiting the note due in the year of his disclosure:

Wherefore this petitioner averred that the Wrigley Company did not come into court with clean hands. This peti-

tioner also averred in its said answer, as well as in the
487 counterclaim filed at the same time, its earlier dates of manufacture and sale of Wintermint, the written notice given to the Wrigley Company as herein averred, and that it was true that the buying public made no distinguishment as between Wintermint and Doublemint, thus causing confusion in the trade, and prayed both for the damages and profits, as well as for general relief. It also denied any wrongdoing or attempt to profit by any imitation of the Wrigley dress or color schemes.

V.

The two suits thus brought against your petitioner by the Wm. Wrigley Jr. Company were by order of court consolidated and brought to hearing together in March, 1917, and after full hearing resulted in the dismissal of both of the bills of the Wrigley Company for want of equity and also the dismissal of your petitioner's counterclaim, whereupon appeals were prosecuted to this court, with the result that this court on June 30, 1918, handed down its opinion herein, affirming the action of the trial court dismisisng both the Wrigleys bills and reversing such court's action in dismissing this petitioner's counterclaim, and ordering an injunction and accounting in 2498, the second suit brought as aforesaid.

VI.

That upon the trial of said cause in the District Court it was established beyond controversy, that the history given by the Wrigley Company of its Spearmint package was false both as to the colors used and the date of use and that in addition to the infringement after notice and before any sale of Doublemint, the conduct of said company in the Pulver litigation, the withholding and secretion of the testimony taken in the Pulver case, both from the record of the courts where said suits were pending and also from your petitioner's counsel until compelled to produce it by an order of the Dis-
trict Court, the said Wrigley Company had falsified evi-
488 dence resorted to perjured testimony and been guilty of other conduct tending to pollute the administration of justice.

VII.

Therefore upon the hearing in this Court your petitioner's counsel urged that the Wm. Wrigley Jr. Company had been shown to be wilful and fraudulent infringer, to have wantonly and maliciously attacked your petitioner, first upon a claimed ownership of a stolen package, and then upon a package in which petitioner's priority was fully known to the Wrigley Company, and that in these unjust efforts to crush and throttle your petitioner's business they had committed such crimes against the decent and honest administration of justice as called for the application of the well-known rule that as against such an infringer and only guilty of such conduct he should be deprived of all profits made by him in the manufacture and sale of the infringing article and cited many cases in their brief to sustain such contention, not asking in their said brief anything but profits or other relief, all of which averments of this petition concerning the second case to this point will more fully and at large appear in the record in said cause on file in this court, to which this petitioner begs leave to refer.

VIII.

That the mandate issued from this court July 30, 1918, used the following language:

"On consideration whereof, It is now here ordered, adjudged and decreed by this court that the part of the decree of the said District Court that dismisses the counterclaim of L. P. Larson Jr. Company be, and the same is hereby reversed with costs; and that this cause be, and the same is, hereby remanded to the said District Court with the direction to enter an injunction and order an accounting."

and upon this being filed, a decree was prepared and entered a true copy of which is filed, herewith marked "Exhibit A,"

and which your petitioner prays may be considered a
489 part, hereof; and thereupon the master to whom said cause was referred entered an order in the words and figures set out in Exhibit B, which is a true copy of said order and to which this petitioner begs leave to refer, and subsequently the said Wm. Wrigley Jr. Company filed its verified account purporting to be a compliance with the master's order and in which said company claimed to have suf-

fered a loss from the manufacture and sale of Doublemint gum during the accounting period of $286,238.30.

IX.

In this accounting so filed, the Wrigley Company pretended to account for the production and sales to January 1, 1916, from a factory owned by it at the date of the filing of the bill situated in Toronto, Canada, and upon an examination of Wm. Wrigley, Jr. by petitioner's counsel, in the hope of surcharging and falsifying the account so filed, it appeared that the Wm. Wrigley Jr. Company caused a corporation to be organized under the Canadian laws, in January, 1916, having two million dollars capital stock, of which $500,000 was preferred stock and $1,500,000 common stock, which corporation was named Wm. Wrigley Jr. Company, Limited, and had conveyed all the assets in Canada to such newly organized corporation, taking in payment for such transfer all the capital of said company, both preferred and common; at the time of such examination of Mr. Wrigley the preferred stock was in the treasury of the accounting party the common stock had been distributed as a dividend to the shareholders of the accounting party, and executive officers of the Wrigley Company owned a majority of the stock of the Canadian company and constituted a majority of its Board of Directors and Mr. Wrigley was president thereof.

It was also developed at this examination that the accounting company owned a factory at Sidney, Australia, until in January, 1916, when a corporation was organized under the laws of Australia, to which the factory was conveyed in consideration of all the shares of the Australian Com-
490 pany which the accounting company had in its treasury at the date of the examination except three qualifying shares of one pound each held by the employes conducting the business in Australia; both of the companies so organized in January, 1916, were engaged in manufacturing and selling Doublemint in the infringing dress.

X.

Thereupon your petitioner's solicitors moved the master to extend the accounting to the operations of these two corporations and to direct Wm. Wrigley Jr. Company to file an account thereof. The counsel for the Wrigley Company

objected and asked leave to examine L. P. Larson, Jr., President of petitioner stating that it was proposed to show that your petitioner had neither the capital, credit, ability or intention to extend its business into foreign countries, and over the objections of your petitioner's counsel that such an inquiry was beyond the jurisdiction of the master as not being within the scope of the mandate of this court and the decree entered in said cause, the master permitted the counsel to proceed and required Mr. Larson to take the stand, and your petitioner files herewith as Exhibit C a list of the demands and inquiries made with reference to your petitioner's business, and books which your petitioner prays may be taken as a part of its petition herein.

XI.

That your petitioner finally, under advice of counsel and for the purpose of presenting the question whether such an examination into your petitioner's affairs is within the scope of such reference, refused to answer further questions or produce its books and papers for further examination; whereupon the master certified the same to the court, and his Honor, Judge Carpenter, on March 19th pronounced the opinion, a copy of which is filed herewith marked "Exhibit D" and made a part hereof, and subsequently entered
491 the order a copy of which, marked "Exhibit E" is also made a part of this petition, which rulings by said master and court have the effect of abrogating and nullifying the mandate of this court and the decree entered in said cause.

XII.

Your petitioner is advised by its counsel that no such uncertainty as to the meaning of this court's action and mandate as is implied by the learned pronouncement exists and that both from the facts before the court when its action was taken, and the accepted legal meaning of the words used, the court did not mean to make the hearing before the master merely an assessment of damages as distinguished from an accounting of profits; that the court's mandate and opinion followed by a decree directing the master to take an account of all profits accruing to the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress and acquiesced in by all the counsel participating

in the discussion of the terms of the decree to be entered under the mandate, became and is the law of the case, and it is not competent for either the master or the District Court to disobey said mandate and decree, and limit petitioner's right to recover for the infringement of an article but recently put out, and to do so is to annul the mandate of this court and cannot be sought for any legitimate purpose unless the account filed by the Wrigley Company is known to be grossly untrue.

Your petitioner therefore prays that permission be given to file this petition and that the Honorable George A. Carpenter may be directed to show cause why the inquiry before the master should not be limited to the ascertainment of the profits if any, made by the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress as prescribed in the decree, and the mandate of this court in all respects obeyed and carried into execution, and for such other and further relief in the premises as the facts of the case may require.

492 L. P. LARSON JR. COMPANY
By L. P. LARSON JR.
President.

CHARLES H. ALDRICH
FRANK F. REED
Solicitors for Petitioners.

State of Illinois, } ss.
County of Cook, }

I, L. P. Larson, Jr., on oath state that I have read the above and foregoing petition filed in behalf of the L. P. Larson Jr. Company, and know the contents thereof, and that said petition is true; that I am the president of said corporation and authorized as such to file said petition and verify the same.

L. P. LARSON JR.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 23rd day of March, A. D. 1920.

Witness my hand and notarial seal.

A. G. LOVELESS,
(Notarial Seal) *Notary Public.*

My Commission expires October 19, 1923.

493 And said petition coming on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that a writ of peremptory mandamus issue from this court directed to Honorable George A. Corpenter, United States District Judge for the Northern District of Illinois, Eastern Division, requiring him to enter an order limiting the inquiry before the Master to the ascertainment of the profits, if any, made by the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress as prescribed in the decree, and the mandate of this court in all respects obeyed and carried into execution.

You therefore are hereby commanded and enjoined that immediately after receipt of this writ and without delay you do proceed to enter an order limiting the inquiry before the Master to the ascertainment of the profits, if any, made by the Wm. Wrigley Jr. Company from the manufacture and sale of Doublemint gum in the infringing dress as prescribed in the decree, and the mandate of this court in all respects obeyed and carried into execution, so that complaint be not again made in the premises.

Witness the Honorable William H. Taft, Chief Justice of the United States this sixth day of October, A. D. 1921.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Endorsed) Filed Jan. 24, 1924 John H. R. Jamar, Clerk.

1725 United States of America
Northern District of Illinois } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

October Term, A. D. 1920.

In Re Petition of } No. 2831
L. P. Larson, Jr. Company. } No. 2822

Stenographic Report of proceedings before the United States Circuit Court of Appeals, (Justice Baker, Page and Evans, sitting) commencing at ten o'clock A. M. on the 29th day of October, A. D. 1920.

Counsel for Petitioner:

Mr. Charles H. Aldrich, and

Mr. Frank F. Reed.

Counsel for Respondent:

Mr. Isaac H. Mayer, and

Mr. Wallace R. Lane.

1726 Mr. Aldrich: If your Honor please, I wish to make an inquiry. I don't know what your ruling is here. There is a motion to dismiss and in the Circiut Court of the United States where there is a motion to dismiss it does not change the order of the procedure. I suppose I have the opening and closing. What is the rule here?

Mr. Mayer: One case is a mandamus proceeding in which a rule was entered by this Court on Judge Carpenter to show cause why he could not—

Judge Baker: Yes, I understand.

Mr. Mayer: We are here to show cause for the Judge. Those two matters are being heard together.

Mr. Aldrich: I am the moving party in both. I claim the right to open and close.

Judge Baker: Is there a motion to dismiss?

Mr. Mayer: A motion to dismiss the appeal.

Mr. Aldrich: In the appeal.

Mr. Mayer: In the appeal suit.

Judge Baker: Well, is that a matter that is entirely separate from the merits?

Mr. Aldrich: Yes, your Honor.

Mr. Mayer: Yes.

Judge Baker: On the statement that the motion to dismiss
2831 is apart from the merits of the matter, we will hear that motion first.

1727 Mr. Aldrich: Yes.

Judge Baker: On that I assume the opening is with Mr. Mayer.

OPENING ARGUMENT BY MR. MAYER.

In 1915 the William Wrigley, Jr., Company filed a bill in the District Court, it being the appellee here, against the L. P. Larson, Jr., Company, the appellant here, in which the complainant, appellee, alleged that it originated and owned a certain combination of colors used on a label for gum, sold under the name of "Doublemint".

A cross bill was filed or a counter claim by the L. P. Larson, Jr., Company in which they claimed that this challenged label was originated by it, its label being "Wintermint" used for gum.

The bill and cross bill or counter claim came on to be heard before Judge Anderson, in conjunction with a prior bill that had been filed by the William Wrigley, Jr., Company against the L. P. Larson, Jr., Company, involving some other gum labels.

On the appeal to this court it reversed the decision of Judge Anderson, holding in the "Doublemint" vs. "Wintermint"
case that "Wintermint", the mark of the L. P. Larson,
1728 Jr., Company, antedated "Doublemint", the mark of the Wrigley Company, by seven months and they therefore had a superior title, and reversed and remanded the case with directions for an injunction and an accounting, without describing the nature of the accounting.

There was no proof of confusion, and this Court so found, but because of certain allegations in the pleadings, not necessary on this motion to go into, this Court thought that there was a likelihood of confusion, the Wrigley bill making charges along that line and the counter claim making charges along that line, although the Wrigley answer to the counter claim denied any confusion. But as will appear from a consideration of the opinion of this Court later, this Court thought

that because of those pleadings there was a possibility of sales of Larson having diminished because of confusion and so reversed and remanded.

Judge Baker: They took the fact of confusion as being established by Wrigley's own showing?

Mr. Mayer: For the purpose of this discussion we can assume that.

Judge Baker: That was what was found?

Mr. Mayer: I beg your pardon?

Judge Baker: I say, that was what was found.

Mr. Mayer: Practically.

1729 Judge Baker: Yes.

Mr. Mayer: Practically. That is, sufficiently so to justify the conclusion that this Court reached.

Judge Baker: That was the only way of reaching it.

Mr. Mayer: That is all there was because this Court expressly says there was no confusion proven.

Judge Baker: Yes.

Mr. Mayer: And they have said there was none necessary to be proven because of the averments in the pleadings.

From an inspection of the marks, labels, this Court agreed with Judge Anderson that there was no likelihood of confusion, but you relied upon what you said was the situation that the parties had created by their pleadings.

When the case came back to the District Court a decree was entered by Judge Carpenter in which he enjoined the Wrigley Company from using the infringing label, and ordered the case referred to a Master to take an accounting of all the profits earned from the sale of this "Doublemint" gum in the infringing labels.

Thereupon Master Morrison, to whom the case was referred, entered an order under the equity rules for the filing of an account.

The account was filed and the examination proceeded
1730 with by the Larson counsel, the opposing counsel now, now here, who questioned the accounting.

Thereupon, pending that hearing, the Larson Company thought that the Wrigley Company ought to include in their accounting the sales that were made by a Canadian corporation, not a party to the suit, and by an Australian corporation, not a party to the suit.

It was agreed after argument that if the Wrigley Company should be permitted to show that the Larson Company never did business in Australia or in Canada, never had any plant,

agency, means, facility or sufficient finances or financial credit or intention to have entered foreign territory, so that it was not competing territory, so that profits if made need not be accounted for because not unlawfully made, it was stipulated that if that was the holding of the Master that we then could go on and examine Mr. L. P. Larson, Jr., the president, and practical owner of the L. P. Larson, Jr., Company, the appellant, on those subjects.

Judge Baker: Mr. Mayer, pardon me a moment. That sounds to me somewhat like a discussion of the merits of that question.

Mr. Mayer: No.

Judge Baker: What is your reason for the dismissal?

1731 Mr. Mayer: Well, I am right up to that.

Judge Baker: I see.

Mr. Mayer: During that examination, Larson refused to answer questions and to produce some books along the same lines. The Master ordered him to do so. He refused to answer, giving as his reason solely that the testimony was immaterial, not that it was privileged, not that it would tend to incriminate.

The matter was certified to the District Court, Judge Carpenter, and after a hearing on two separate occasions he decided that that testimony was essential and was proper; and that as long as the Wrigley Company were assuming the burden of separating profits, if any, from sales in competing territory, from those in territory where the Larson Company was never known, had not entered and had no intention of entering, that that was proper, and so he ordered Larson to give the testimony and to produce the books. From that order—

Judge Baker: Let me get your construction of the jurisdictional question. Suppose that you had insisted that Larson should go into the subject matter of the right of divorce between Larson and his wife, and the Master had held that was a proper subject matter, and Larson had decided that it

had nothing to do with this gum selling case and refused

1732 to answer, and the Master certified the matter to the

District Judge, and the District Judge ruled that the differences between Larson and his wife was proper and material evidence, on the gum selling proposition. When the decree had been entered by this Court, directing that an injunction be issued and ordering the District Court to proceed to an accounting of the gains and profits, that Wrigley de-

rived from selling Larson's gum, wouldn't Larson have a right in some way to come here and have the inquiry into his domestic relations, which had been stated by counsel would be carried on possibly for ten years, and the hearing before the Master prolonged indefinitely, put a stop to in some way?

Mr. Mayer: Oh, yes, unquestionaly, unquestionably.

Judge Baker: Therefore, if in law the evidence that the Court proceeded to bring out, that Larson refused to answer, is in law as immaterial as the domestic relations between Larson and his wife, then there is jurisdiction in this Court in some form to stop that irrelevant inquiry before the Master, directing him to proceed to business.

Mr. Mayer: Undoubtedly. Let me say, though, before I tell you what the remedy is, that while I know your Honor had no intention of creating a supposititious case based on a wrong premise, you did use one expression that I must
1733 correct, because it will become important hereafter. I wouldn't want your Honor to labor under a misapprehension. This Court did not direct an accounting of profits. I want to impress that upon your Honors from the start.

Judge Baker: We directed whatever accounting—

Mr. Mayer: I beg your pardon?

Judge Baker: We directed whatever accounting the plaintiff was entitled to.

Mr. Mayer: And the District Court would have to determine that in the first instance.

Judge Baker: What?

Mr. Mayer: And the District Court would have to deter mine that in the first instance.

Judge Baker: Well, if he would hold that a man was not entitled to profits then again that matter would come up. A Court has not a right to prevent the party from going into what he is entitled to, and not being diverted to side issues.

Mr. Mayer: Of course, if this Court had held something in this opinion, or in this mandate which is not being complied with, the parties have a relief and I would not be complaining or resisting. I did not think it was right and I think before I conclude your Honors will agree with me, to let a motion
1734 be made from an appeal from an order of that kind if it is not appealable.

Of course, we are not discussing the merits now of the subject matter. This is a motion made to dismiss an appeal, because I thought it is a duty that counsel owed to this Court

not to let it go on and decide an appeal case if it has no jurisdiction, without drawing the Court's attention to it.

Now, let me answer your Honor's question, what is the relief, because that is a very pertinent question. This Court has answered that question and the Supreme Court of the United States has answered it in the Bessette litigation.

This Court puts the question to the Supreme Court as your Honor put it to me. I have reference to the case of *Bessette* v. *W. B. Conkey Company* in the 133 Federal, 165, where this Court, then composed of Judges Jenkins, Grosscup and Seaman, asked the Supreme Court the precise question. The Supreme Court answered it in the 194 United States, and the law as there announced has since been recognized by this Court in a case in which your Honor, Chief Justice Baker, sat, *Hultberg* v. *Anderson*, 214 Federal, 349, and other cases to which I shall draw your attention.

So that the law is now established, first, that a witness has no right to interpose the objection of immateriality;
1735 that that is no concern of his; that that is a matter for the parties. That an order directing a witness to testify or produce books is not a matter from which a party may appeal.

Of course, you understand that the appeal in this case is not by Larson, the witness, but by a corporation, L. P. Larson, Jr., Company.

The decisions also are to the effect that the party never can appeal from anything that affects the witness, that the witness, however, if he wishes to stand upon his right and refuse to testify to his marital relations, if you please, may do so, that the order of the Court directing him to so testify does not become an appealable order unless and until the next step is taken, namely, an adjudication of contempt, and in that case—

Judge Baker: That is, so far as the witness is concerned, of course.

Mr. Mayer: Yes.

Judge Baker: He could not appeal until the next steps were taken. He is not concerned in that litigation.

Mr. Mayer: No.

Judge Baker: But may not a party who has a directory and mandatory decree by petition or appeal bring up the subject matter of the mandate of the Court and procure
1736 directions that the Master or the District Court supervising the Master, shall comply with the mandate of the Court?

Mr. Mayer: Yes, yes.

Judge Baker: Well, it doesn't matter what the attitude of the witness is, of course. But we can see here that the question does not concern the witness, but the objection was to the Master's spending time on the pursuit of the inquiry that you are embarking upon. That was the objection of the Larson Company, the holder of the decree of this Court.

Mr. Mayer: That same thought has occurred to others and the Supreme Court of the United States has answered it in *Doyle* v. *Guaranty Company,* 204 U. S. There a party refused to comply with an order to produce books. I think your Honor is overlooking the fact that an appeal is statutory only and that no case may be reviewed on appeal unless it comes within the provisions of the statute.

Judge Baker: Yes.

Mr. Mayer: There are but two statutes permitting appeals.

This Court in the Christianson case, very recently decided —I think your Honor, Judge Baker, was in that case—went very fully into that subject. An order must either be an
1737 order for an injunction or the appointment of a receiver, or enlarging it or restricting it, which this manifestly is not, or it must be a final order.

Now, in all of the cases to which I have referred the courts have squarely held that that order is not final. I don't want the presiding Judge here to think that I am trying to resist on a review by this Court of what occurred. I don't want the Court to get that impression. I repeat that if that which did occur—

Judge Baker: You are quite right, Mr. Mayer, in stating the limitations upon the right of appeal. It is a matter of grace or a matter of right, and depends upon the scope of the statute and the proper interpretation of that.

Mr. Mayer: I don't want the Court—

Judge Baker: That is the basis of your motion to dismiss the appeal.

Mr. Mayer: Precisely; but I don't want the Court to think that because I am making that—

Judge Baker: Well, that would be immaterial. Of course, we are now considering merely case No.—

Mr. Mayer: 2831, I think it is.

Judge Baker: 2831, on your motion to dismiss. I suppose the same subject matter is involved in 2822.

Mr. Mayer: That is the merits.

Judge Baker: Yes.

1738 Mr. Mayer: Whether or not he has testified to something about the marital relations.

Judge Baker: Yes.

Mr. Mayer: Yes, it is.

Judge Baker: We will hear from the other side on your motion to dismiss.

Argument by Mr. Aldrich.

Mr. Aldrich: If the Court please, if this matter is to be reserved, I would prefer to answer the argument that has been made in the course of my discussion of the merits, if you will permit me to do that. I can say in just a word what my position is.

Judge Baker: Well, from what was developed so far it appears that the shortest way to get all of the facts is to let you proceed and put in, when and where you deem most appropriate, your answer to the motion just made.

Mr. Aldrich: I shall discuss that question. Now, I would like to make another inquiry, and that is, what time is allowed here in this case?

Judge Baker: Well, the rules of the Court allow, and I suppose that becomes a matter of right to the counsel,

1739 two hours on a side, less than two hours if necessary. We endeavor to persuade counsel not to insist upon their right. If more time is necessary we extend it.

Mr. Aldrich: Well, I seldom have found a case that required two hours to discuss it.

Mr. Mayer: May I inquire whether this is being treated as two cases on hearing or not.

Judge Baker: No, one matter.

Mr. Mayer: That is the two hours having reference to both cases?

Judge Baker: Yes.

Mr. Aldrich: I am starting about eleven o'clock, five minutes of eleven, then.

If the Court please, in view of the change of the personnel on the bench, as compared with when the case was originally heard, I desire to make a brief statement of the facts of the case.

I do not understand that I have any right in this connec-

tion to reargue the questions which we deemed settled by the Court, and this Court in the decision of the original case. But in order to point out the application of what I have to say on this question, I wish briefly to state the facts.

1740 In October, 1911, Mr. Wrigley brought the first suit against—the Wrigley Company brought its first suit against the Larson Company, alleging that it was the originator of a peculiar and distinctive style of dress for its packages of gum and particularly Spearmint gum, and that the Larson Company had infringed that dress by its Peptomint gum. That distinctive style was described as a counter band or outside wrapper of red, white and green, and the individual sticks of gum, five in a package, wrapped in pink wrappers and it was said that the Larson Peptomint gum infringed that wrapper.

Judge Carpenter granted a preliminary injunction in that case and that stood in force until the final trial in 1917 in Judge Anderson's court.

Mr. Larson, the Larson Company, checked its dates and in 1915 the Wrigley Company brought its second suit, seeking an injunction and accounting, alleging that Larson's Wintermint gum, the individual sticks of which had been dressed in green, was an infringement of both its Spearmint and its Peptomint.

Judge Baker: Doublemint.

Mr. Aldrich: Doublemint gum.

The Larson Company filed, got leave of Judge Carpenter to file an amended answer in the original case, of the Spearmint against Peptomint, and substantially the

1740½ same answer in its main averments was also filed in the later suit involving Spearmint and Doublemint on one side as against the Larson Wintermint on the other.

The answers so filed set out that the Wrigley Company's averment that it had dressed its Spearmint package with the described dress from 1893 or '94 was a false averment; that it was never so dressed until 1907, as was averred in these answers, and it was afterwards established in the evidence, and by the admissions of Mr. Wrigley, both in answer to interrogations and as a witness on the stand, that it was never so dressed until 1906. Prior to that time it had been, the individual sticks had been dressed in a white wrapper, for the individual sticks, projecting from the counter band out a quarter of an inch at each end, and then later it had been

dressed, these sticks had, in tinfoil, and the packages in no way resembled each other.

The answers also set out that the Wrigley Company had not originated this color scheme, that it was a rank copy, and a plain copy of an earlier package that had been on the market and sold by the F. F. Pulver Company and then by the Digesto Company from 1891 to 1913, when, as a result of a suit brought by the Wrigley Company against the Pulver Company, both in the Southern and Western Districts of New York, the fact that Wrigley had not thus dressed, was
1741 not the originator of it, and so forth, had been clearly established, and that Mr. Wrigley had bought out and scrapped the Pulver business, paying him $250,000, $100,000 down and five notes for $30,000 each, due annually, and entered a decree which was false in its averments and an imposition upon the court.

As I wish to conserve time I might say that already in the briefs which have been filed in the present case, there is criticism of the fact that it is suggested that the basis of our objection to that decree is that we have said it was a consent decree. The basis of our objection to that decree was, and it is, I think, embodied in the opinion of this Court, that it found that the Wrigley Company was the originator of that package, to have absolutely rights therein, that Pulver had infringed, and that he had paid the damages, when in fact all of that was untrue.

There was a counterclaim filed in which it was set up, as it was also averred in the answers, that with reference to the second suit of the Spearmint and Doublemint against the Wintermint that before Wrigley had bought and sold a package of Doublemint gum, the first sale of which was on July 28, 1914, the Larson Company under date of May 29, had warned him that it was advised that he was contemplating an in-
1742 fringement of its labels, and warning him against doing so. Under date of June 2nd, 1914, Mr. Wrigley answered, asking for copies of the labels, and they were sent under date of June 3rd.

So that we had here in the first place, if the Court please, a case where the Wrigley Company's first suit was based upon a stolen package, that it had appropriated bodily from the Pulver interests. There was abundant proof in the record that such had been the habit of the Wrigley Company, and a chart was a part of the record in the case which showed the

appropriations of earlier and successive gums by the Wrigley Company in copying the labels of these different gums.

That first bill was verified by William Wrigley, Jr., president of the Wrigley Company. The second bill was verified by A. J. Cox, the vice president of the Wrigley Company at the time of the verification.

In the prosecution of that suit, although in answers to interrogatories filed in the second suit, Mr. Wrigley had admitted that the gum had not been so dressed as described in the bill until late in the fall of 1906, witnesses were put upon the stand who testified that it had been so dressed since 1893 and 1894, not one but several of them. Their attention was not called to the fact that already had appeared on the
1743 record in answers to interrogatories that their answer was false, but they testified with great particularity, making it as clear as they could, that there had been—that that dress had been used twelve years and more before it had actually been used by the admissions of both Mr. Wrigley himself and his counsel upon the record.

There was a question in the record as to when Spearmint had been first originated. They claimed 1893 or 1894. And we say, in fact the record established the fact, that there was a trial package of Spearmint made in 1902 and that had been disposed of, that trial package had been disposed of in a few shipments, and that the manufacture of Spearmint had been abandoned until late in 1906, when the advertising campaign which made Wrigley famous and rich was inaugurated and his success began.

So that in the effort to establish that he had manufactured it twelve years earlier than that date, they put witnesses on the stand who testified that the Zeno Manufacturing Company had a fire December 31, 1904, which had destroyed the records and books which prevented their going into that, prevented their establishing these earlier dates. That was shown not to be true, and finally J. C. Cox, the treasurer of the Wrigley Company, was put upon the witness stand, and in an-
1744 swer to question which we addressed to him, he stated that the books were not destroyed, that some of them were damaged by water and that they were copied by the officers of the Zeno Company, he being then connected with the Zeno Company and then destroyed by them themselves.

There are other matters of like nature which characterize the conduct of this trial all the way through.

In short, one suit, then, against the Larson Company was

predicated upon the package he had not originated and had filched from another. The second one was with reference to a package of which he had notice before he ever sold the first package of Doublemint gum and had gone on and harassed Larson with another suit.

Now, in the second suit he made the averment, or the averment was made, that they had found, as a matter of fact, that the buying public made no discrimination between the Spearmint, Doublemint packages, on one side, and Larson's Wintermint package on the other, and that confusion existed in the trade. It was not a matter of opinion. It was a matter of positive, distinct averment. In the answer that averment was admitted and it was shown that Larson's Wintermint package had been originated in December, 1913, that applications for its registration had been made in February,
1745 1914, which had been allowed by the office in May, 1914, and finally certified, final certificate had been issued in June, 1914. So that with distinct notice they had entered upon that unfair suit.

Now, it is not fair to say that there was no evidence. I am not discussing that. I am only stating facts, because both Wrigley and Cox appeared as experts, and the Court in its opinion of this case decided that the similarity of the packages was such as to breed confusion.

Judge Baker: I suppose you will grant that the record in other respects would justify the Court in not accepting their testimony?

Mr. Aldrich: It might, only, if your Honor will allow me to answer that question—I do not wish to engage in any discussion with the Court, but permit the suggestion that in the opinion as written by the Court where matters of public policy, of land cases, or in which the public is concerned, it is said that such admissions the Court can scrutinize them, but since the Court's opinion was written, we have had occasion to look with some care into the question and I submit, if the Court please, that the great weight of authority is that we would not even be permitted to prove that there was confusion where it was so clearly admitted on the record.

The Courts have said that where there is an admission
1746 of that character, the parties are not entitled to offer proof of it because that is supplementing and adding to what has already been established and not the subject longer of controversy.

But I do not wish to discuss the original case. Your Honor

entered the decree for an injunction and an accounting. When that decree came to be prepared it was not a matter of idle or careless preparation. The decree provided that the Master should take an accounting of all the gains and profits of the William Wrigley, Jr., Company arising from or accruing to it from the manufacture and sale of its Doublemint gum, from the date of its first sale, July 28, 1914, to the date of the entry of his decree, and such time thereafter as would enable the Wrigley Company to change its infringing dress, not exceeding ninety days.

And it also gave the Master power to employ accountants, chartered accountants, who should have no connection or relations to either party to this controversy, or to their counsel, but who should be sworn in the discharge of their duties, and all of the employes who were likewise put upon the books were likewise to take the oath which was prescribed, and they should examine the books of the Wrigley Company and
1747 ascertain its gains and profits from the manufacture and sale of Doublemint in the infringing dress for the period prescribed, and making such deductions for overhead, proportionate deductions for overhead, advertising and other proper expenses as were proper. Such accountants—I will refer to that later—were appointed.

While we were preparing this decree, if the Court please, there was an attempt made to substitute a bogus package. I am not going to discuss that at length, but the statement was made to the presiding Justice of this Court that at the time when the second suit was commenced, which was June 15, 1915, the Wrigley Company had not dressed those packages, and sealed those packages and did not originate them until some three months thereafter. It is now part of the record by stipulation.

The original record in this case, as it stands before the Master, is up here as a physical exhibit so that the Court may examine it, and counsel are at liberty to call the Court's attention to any part of it that may be deemed by the Counsel addressing the Court material to the controversy in the case.

The record should have been here. Judge Carpenter ordered it here, but so far I have not seen it. Do you know whether it is here?

1748 Mr. Mayer: I know nothing about it, Mr. Aldrich.

Mr. Aldrich: I asked the Master yesterday to see that it should be here.

But I have here two advertisements in the Saturday Evening Post, showing that in February—and they are a part of the record, the duplicates of these are a part of the record, showing that in February, 1914, Wrigley was advertising his Spearmint Pepsin gum without a sealed package, dressed in that way. He commenced in March, 1914, to advertise a sealed package, dressed tight, and so forth and so on, but continued it March, April, June, August, November and December. I have his advertisements here of his Doublemint, which is in December, December 12, 1914, and then the bogus package which was put forward, was not a success and which would have limited the accounting to a period of about three months.

His first advertisement of a sealed package that way, found in this magazine, was March 21, 1914, a year and three months earlier, six months earlier, eighteen months earlier, than was alleged in the letter addressed to the presiding Justice. That is further referred to in the briefs. I will not dwell on it now.

The Wrigley Company submitted two decrees to the Court, and opposing counsel, and in both of them they—they
1749 are set out as exhibits in No. 2822, the mandamus case, and in both of these they made the Wrigley Company account for all its gains and profits, admitted that.

There was an injunction issued. I don't think I need to argue in this court that when an injunction is issued and there is an order for an accounting, that it means an accounting of profits. And right in there is found in reality the controversy between the parties in this case.

Judge Baker: It means, if necessary, more than an accounting of profits.

Mr. Aldrich: Yes, it does.

Judge Baker: It means, the term, "Accounting of profits" means what a man is entitled to whose property has been trespassed upon.

Mr. Aldrich: Yes.

Judge Baker: It is to recover all of the damages that he has sustained. If no injunction is asked, of course it is an action at law to recover all damages.

Mr. Aldrich: To recover his damages, yes.

Judge Baker: If he goes into equity to get an injunction, it is solely by reason of the prayer for injunction that equity has jurisdiction. Having jurisdiction for that purpose,
1750 in order to do complete justice in one hearing, in one suit, it will take unto itself the law matter, namely, the

damages. Now, profits, is simply one way of measuring the damages, or a part of the damages.

Mr. Aldrich: Yes.

Judge Baker: It may not cover all of the damages.

Mr. Aldrich: It does not often cover all of the damages.

Judge Baker: Of course the defendant in such a matter is not permitted to raise a word with respect to profits, because he is trustee ex maleficeo.

Mr. Aldrich: That is right.

Judge Baker: And every cent of profits that he has made from his trespass is the property of the owner of the right that has been trespassed upon.

Mr. Aldrich: Now, if the Court please, you may recall perhaps right now that in our brief in this case, when it was submitted to you on the original hearing, we asked only for profits. We recognized, if the Court please, that a new brand of gum, which had only been put out by a small manufacturer, if you please—I shall have more to say of that hereafter—had only been on the market seven months, and had been infringed upon by the Wrigley Company which had its agencies and manufacturers established everywhere, we realized that

the damages, because both "profits" and "damages"
1751 are works of art and have an accepted meaning in the law, there is no room for discussion as to their meaning, among lawyers, as I submit, but we were entitled to both profits and damages. We told the lawyers in our brief that we would not ask for damages, that we would waive our damages and ask only for the profits of the Wrigley Company. He could anticipate us, forestall us by reason of his organization that extended all over the world, and it was though by Mr. Reed and myself that therefore we should make our request to the Court that we be awarded the profits.

The point I am not making is that in the preparation of these decrees all parties construed the decision of this Court as having given us the profits accruing to the Wrigley Company arising from that term, and in both of the two drafts of the decree submitted by opposing counsel and in the decree that was finally accepted and entered by Judge Carpenter, the provisions were as I have said.

In the discussion of the original case, and I refer to it now, we supposed that everybody understood the difference between profits and damages. We understood that profits was the difference between the cost and the yield, as defined by the Supreme Court case in the Rubber Company against Good-

year and also in the case growing out of the *Eyster* v.
1752 *Centennial Board* in 94 U. S., cited in our briefs, while damages were always based upon the actual losses, as near as they could be proven.

All parties made up a decree for profits and the decree was so entered.

Then it was found that at the time this counter claim had been filed, in the summer of 1914 or '15, that the Wrigley Company was the owner of a factory at Detroit, at Toronto, a Canadian factory, and had another factory in Australia. It was found that both of these companies had been manufacturing during the whole infringing period Doublemint gum clothed in its infringing dress.

In January, 1916, six months after the filing of the counter claim, an arrangement was made by which the Wrigley Company organized a Canadian corporation, having $1,500,000 worth of common stock and $500,000 worth of preferred stock and they took the capital stock in consideration, the Wrigley Company did, in consideration of the financing of the Canadian corporation; and that probably a similar arrangement was made in the Australian Company. They organized a corporation having 10,000 pounds capital stock, took all the shares except three qualifying shares for people who were residing in Australia and managing the corporation, into its treasury.

1753 In other words, the Canadian corporation had distributed the common stock to the Wrigley stockholders as a stock dividend. They had the preferred stock in their hands. In the case of the Australian corporation, they had all the stock, at the time Mr. Wrigley was examined, in the treasury of the Wrigley Company.

The officers of the Wrigley Company, of the Canadian corporation, as organized, consisted of officers and directors and employes of the Wrigley Company.

I am accused of having made an inadvertent statement in one of counsel's briefs in that I made Mr. Buck appear as a director of the Wrigley Company when in fact the record shows that he was superintendent of the manufacturing interests of the Wrigley Company, a distinction which I have not observed, and to that extent my statement was in error. But the majority of the directors are Wrigley men, connected with the Wrigley interests and close at home.

We moved to extend the accounting as against the Wrigley Company to the operations of the Canadian Company and at

that time Mr. Mayer objected and stated that he desired to examine Mr. Larson for the purpose of showing that Mr. Larson was insolvent, or the Larson Company was small, was not able to carry business into Canada or do business there or in Australia, and that he could not have intended to go
1754 there. In other words, this Court is asked to speculate upon what Larson could or might do some time hereafter, because he is small, when the record shows that for ten years every effort has been made to keep him small. Wrigley has annoyed him with law suits and by his advertisements.

Both of the Wrigley bills were dismissed for want of equity and the counter claim sustained.

I objected, not only—I have never stipulated that Mr. Larson's testimony might be taken and I objected before the Master, we did, both on the ground that the Master had no jurisdiction; that his commission was found in the decree that had been entered in this case, and that that decree was practically the decree of this Court. That has been made times said by the Supreme Court of the United States; that the Master must find his powers there, and anything that he attempted to do, any subject he attempted to investigate must be found within the four corners of that decree. If it was not there he had no power and no jurisdiction and we objected on account of the materiality, immateriality and so forth.

Subsequently, when the Master ruled against me, I hoped that there would be an end to this thing, and such was Mr. Reed's hope also, but it continued interminably, and
1755 upon our advice and for reasons which were adequate to counsel, we finally instructed Mr. Larson to spread upon the record a statement that he should answer no more questions and furnish no more information along these lines and that we would submit it to the Court. The Master directed him to answer. He declined to do so for the reasons stated and it was taken to Judge Carpenter and Judge Carpenter decided against us.

We are here both by appeal and by mandamus, and in addressing myself, if the Court please, to the subject of appeal, we have cited in our briefs a good many cases holding that, such a situation as this can be remedied both by mandamus and appeal or by mere motion, and opposing counsel have cited against us a good many decisions to the effect that when a witness refuses to answer a question that the decision is not a final decision, and that there can be—

Judge Baker: That is, so far as the witness is concerned.

Mr. Aldrich: Well, I will go even farther. That is, as far as the witness is concerned, but I will go even farther, if the Court please.

Counsel have overlooked that distinction, and in the cases cited, the very obvious distinction that has been repeatedly recognized by the Supreme Court of the United States,
1756 and I submit must be accepted as law in this court, and which I think this court itself has recognized.

Now, the difference in a primary case, in a primary hearing, original hearing on a reference before a Master where no decree has been passed anywhere, and with reference to the rights of parties, witnesses or the Court, and the difference between a case where the Court is acting under a mandate of a superior court so obvious that it ought not to be neglected.

The leading case is the case in the 14th Howard, and counsel have indulged in a misapprehension in their citation and use of that case.

In that case, if the Court please, a creditor had recovered a judgment in the Circuit Court of the United States for a considerable sum of money. The debtor had appealed to the Supreme Court of the United States and had been unsuccessful. The Court affirmed the judgment of the lower Court for the amount thereof and directed that it should be collected by this man with six per cent interest. They had a law in Mississippi at that time by which such judgments bore eight per cent interest. So they took out an execution under that mandate which said nothing about any eight per cent, took out an execution for the amount of the judgment, the original judgment with six per cent interest—and with eight per cent
1757 and six per cent damages, what the Court called the six per cent. The debtor paid the amount of the judgment and the six per cent and it seems by some misapprehension he paid some sixty dollars more than that. He then moved the Court to cancel the execution as to the eight per cent, which amounted to some $3100, and declare it satisfied and have the repayment of his over-payment of sixty dollars. The Court referred that to a Master or Commissioner to make the computation. The Commissioner reported that there had been an over-payment of this sixty dollars and that if the judgment creditor was correct he yet owed the sum of three thousand and some hundred dollars. If the debtor's intention was correct there had been simply this overpayment. He decided nothing. He just reported those facts to the Court.

The Court called upon him to act and quash the execution,

deny the motion to cancel the execution, or withdraw it, but directed it should not be enforced pending the appeal to the Supreme Court of the United States.

Now you will see that within the ordinary meaning of a final decree, which, as I understand it, means that it is a decree that settles the rights of the parties, there had been no
1758 final decree. The decree had stood as entered. He said "I won't quash this execution, I won't enofroce it; I won't allow it to be anforced until you appeal to the Supreme Court." There was an appeal prosecuted to the Supreme Court of the United States.

There the Chief Justice says that this may be deemed in view of the mandate a final decree within the meaning of the statute. He says this is a mere question of practice anyhow. He says that it could be done by mandamus, by appeal or by mere motion to the Court; that any one of the ways that brings it to the Court's attention that its mandate is not obeyed is adequate for the purpose if in fact the mandate is not followed.

I rely upon that case and the succeeding cases that have been cited, if the Court please, with approval, as well as the 236 U. S.

Many and many a time in the line of cases which are cited upon our brief, where the question of obeying the mandate or disobedience thereof had been brought before the Court this distinction has been noted and it has never failed to bring about the result.

Now, they say that the distinction which we have made on our brief here between a primary, original hearing before a Master, where no decree has been passed and a case where they are operating under the mandate of a Superior
1759 court is no distinction. And they say that in Mason against the Wabash Company in 153 U. S. that is shown to be true. Just a brief statement of the facts in that case will show that this contention is unfounded.

In that case there had been a litigation between parties and the court had given the decree and it had gone to the Supreme Court of the United States and the court had affirmed in part and reversed in part the decree. It had directed that one of the parties should pay the costs.

When it came back under the mandate of the court—at that stage of the litigation some solicitors intervened who had rendered services to the parties and asked that their costs as between solicitor and client should be taxed in that case. The

court below felt, and so held, that that kind of costs did not come under the mandate under which the Court at that time was acting. There was an appeal prosecuted to the Supreme Court of the United States.

That appeal was taken on August 20th, 1891. The Court of Appeals Act, which as we know had taken away and consigned to this court a large part of he Appellate jurisdiction of the Federal jurisdiction, had been passed March 3, 1891, and gone in force, as I remember, July 1, 1891. Therefore this
1760 appeal, taken August 20, 1891, was after the Court of Appeals Act had gone in force. The court held that the appeal should have been to the Court of Appeals and not to the Supreme Court under the circumstances.

It is said that the case in the 14th Howard is there distinguished. It is not distinguished. Attention is simply called to the fact that in the 14th Howard case an amount, namely over three thousand dollars was involved, and that gave them jurisdiction of the appeal and that in the Mason-Wabash case the amount was shown to be not within the jurisdiction of the Supreme Court. The citation of the Martin-Hunter case in 152 there shows that this construction is right.

So that counsel are in error in saying that that shows that the same rule applies with reference to denying or refusing to answer questions when you are proceeding under a mandate and on a primary hearing and also in error in saying that the 14th Howard case has been distinguished.

Now, a word more. We call attention to the Gains-Robbin case and two other cases where this principle that we can appeal or take—or seek mandamus or by motion, has been announced and it is asserted that since the Court of Ap-
1761 peals Act has been passed that that is not so. In this case, if that distinction had any validity, as it has not, that would be important because we have come here.

The matter is reviewed at great length with citation of many cases in the Blake case in the 175 U. S., and the rule is there laid down which makes one exception to the rule as I have stated it here. It is stated by Chief Justice Fuller in that case that where a mandate is not obeyed—

Mr. Mayer: Pardon me. Is that case in the briefs?

Mr. Aldrich: It is in the brief.

Mr. Mayer: Under what title, please?

Mr. Aldrich: You can find it. It is in my citations, the whole long list. I will not stop for that but it is the Blake case.

I draw the distinctions and in the brief it is there discussed, quoted from and the cases given.

It is said that there is an appeal, a mandamus and so forth, in all cases except when they come from a state court, and as between federal courts, deriving their jurisdiction from the same authority, why, that can be done, but that in cases where a state court is not obeying the mandate, the remedy should be by appeal and not mandamus. That is the only exception so far as our search has enabled us to establish.

1761 So that I submit that there is no occasion for dismissing the appeal.

And now, if the Court please, just a word on this other. Mr. Mayer has said here—I need not stop to cite it or quote it, unless he desires it—that he does not wish to change Judge Carpenter's—the decree that had Judge Carpenter's approval and followed your mandate, but he claims that we are only entitled to such profits as would have accrued to us in competing territory, that places where we had not any business, had not yet extended our business, and, as he says, could not have hoped to extend our business, are barred.

I offered, we offered to stipulate on the record, and stated that we would admit we had no business in Australia or Canada. Our contention was, as opposed to his, that the injunction was universal, the order to account was as universal and that the order to account meant just what your Honors' decree in the Walker case meant, where you end your opinion, in the 255 Fed. with the exact language that is used here, "Take an accounting", and the order was entered for gains and profits made by the wrongdoer, and also for all damages that had been suffered. We are not entitled to damages because we do not ask them.

1762 Now, the authorities are, as I understand it, that in all cases where there is an order for an accounting that means an accounting of profits; that if there is an adjustment of damages different language is used and Mr. Mayer does not wish to change the decree, but he says that we are to be so limited and he bases that argument, as I have understood his brief and his argument before the Master, upon the contention that where there is no competition there can be no unfair competition.

Judge Baker: That is true enough, if that is the basis of the right.

Mr. Aldrich: What?

Judge Baker: I say, that is true enough if that is the basis of the right.

Mr. Aldrich: That is not the basis of the right.

Judge Baker: All right.

Mr. Aldrich: I will come to that in a little while, if the Court please.

Judge Baker: Now about this question of profits, isn't that old Proctor case, the old soap case, in your brief?

Mr. Aldrich: Yes, I think it is quoted. At least one of the cases is quoted.

Judge Baker: Or in your opponent's brief?

Mr. Aldrich: What?

1763 Judge Baker: I don't think my memory can be at fault.

Mr. Aldrich: You mean Tillman against Proctor?

Judge Baker: I mean Tillman against Proctor, yes. That holds that profits are not something off by itself; that what a man is entitled to from the other who trespasses are damages that will compensate him for the trespass, but the only way of measuring all of the damages to compensate the man for what he has lost by reason of that trespass is to say that the defendant if he has made profits from his trespass, that to that extent the defendant cannot say that those do not belong to the plaintiff as damages.

Mr. Aldrich: Yes.

Judge Baker: That is held, according to my recollection, in Tillman against Proctor and a great number of cases.

Mr. Aldrich: Yes, a great number.

Judge Baker: So the only question is, where there has been a finding, where Wrigley went out and sold Larson's gum—that as all it is.

Mr. Aldrich: It is a question of trade dress, if I may say that. He did not sell Larson's gum.

Judge Baker: In law he sold Larson's gum.

Mr. Aldrich: He sold Larson's gum in that sense. In our original brief, we haven't any desire to modify that in any way, we base our contention now on the same proposi-

1764 tion, that there is a difference between the wilful and malicious infringer and one who has innocently and without knowledge of the party's right infringed the dress of another. Mr. Mayer denies that difference.

Judge Baker: It is immaterial, except for the question of exemplary and added damages. A man who trespasses and

makes a profit out of the other person's property becomes immediately in law a trustee.

Mr. Aldrich: Yes, a trustee.

Judge Baker: Trustee of the profits of the man whose property he is using. Therefore, I have said in finding that the damages were identical in law, Wrigley was selling Larson's gum.

Mr. Aldrich: Yes.

Judge Baker: That is all there is to it, the whole case.

Mr. Aldrich: Just one word more and I am going to finish.

There are other matters called to your attention in the briefs which the Court will doubtless notice. I want to express this idea only and then I am going to finish my opening.

It is a mistake to think that unfair competition can be narrowed to the mere question of palming off or substitution of goods. It can consist of any conduct which is unethical
1765 and contrary to what gentlemen would do in private life among themselves. Just as there has been a race between the safe makers and the burglars, there has been a race in the development of this law as between the man who is an unfair trader and seeking to get advantages and the other man.

And as this Court held when Judge Woods was sitting here, that mere advertisements may constitute unfair competition, and as the Supreme Court in a very recent case, in the International News Service against the Associated Press has held that what was being done there constitutes unfair competition, we protest that this rule, that this term which is as broad as the powers of equity cannot be limited to the mere substitution of goods or the palming off of goods for those of another, and therefore, just as a court of equity has power to reach and right every wrong which constitutes unfair competition, to bring these baseless suits, based upon false evidence, and false swearing and bills untrue, in both of which they admit it, and that that constitutes unfair competition and can be reached by this Court.

I thank you.

1766 REPLY ARGUMENT BY MR. MAYER.

Mr. Mayer: May it please your Honors, as I view the merits of the controversy, they are not difficult of solution and are not complicated. We must, however, know what is in this record before any conclusion can be reached.

The question really before your Honors is this: Is anything taking place in the District Court contrary to what you have ordered? If nothing is taking place contrary to what you have directed, but if that which is being done there is an open matter, not decided by you yet, heretofore, on the previous appeal, then we need not spend a minute in finding out whether or not that which is going on meets with your approval or not.

By saying that, I do not wish to be understood that if you are now considering the propriety of what is going on, as a new and independent question that you would not, incidentally, after a full argument and consideration of the authorities, come to the conclusion, first, that the Wrigley Company is not a malicious trespasser in that sense, and, as Judge Baker said, there is evidence distinctly disputing the charges of Mr. Aldrich, and the reading of your Honors' opinion will dis-
1767 close that in the case now at bar the Wrigley Company was not found guilty of anything except that there is a clear inference, quoting from your opinion, that when the Wrigley Company adopted this mark, this Doublemint mark, they knew of the Wintermint mark. A legal, careful, proper analysis of this record compels us to differentiate between the fact that Wrigley filed a bill in 1911 in which he claimed to own Spearmint and in which he sought to enjoin Peptomint from the case now at bar.

In the 1911 Spearmint vs. Peptomint suit this Court found the Wrigley Company guilty of unclean hands and only on one point, and that was that there had been a concealment by the Wrigley Company in connection with the Pulver litigation.

Judge Baker: Of course, that involved a false oath knowingly made as the basis of the litigation against Larson.

Mr. Mayer: Let us see, if your Honor please, what there is to that. In the first place—

Judge Baker: Well, that is merely an aside.

Mr. Mayer: May I take a minute on that inasmuch as your Honor has made the statement?

Judge Baker: Yes.

Mr. Mayer: I must assume that because your Honor made the statement that it may have some bearing upon the
1768 present question.

Judge Baker: Oh, no, I am not saying that.

Mr. Mayer: At any rate—

Judge Baker: You are going back to the 1911 litigation, and saying that the only thing found was the question of concealment. No. I was saying that that was found simply as a premise for the conclusion that the litigation which Wrigley began against Larson in 1911 was a wilful oppression based upon a knowingly made false oath.

Mr. Mayer: Well, now, if your Honor please—

Judge Baker: That is the reason that case was dismissed.

Mr. Mayer: Well, just let me say this on that. The Pulver litigation was not settled until several years after Mr. Wrigley made his oath. The evidence in the Pulver case did not come out on behalf of Pulver until several years after Mr. Wrigley made his oath and bear in mind that in the Pulver case—

Judge Baker: Oh, well, that is the second suit. The Pulver case had been settled. You tried to fasten the Spearmint claim on that. He knew about that.

Mr. Mayer: Now, let us connect up with the second suit.

Judge Baker: There can't be any question about it.

Mr. Mayer: In the second suit he again asserted that he was the originator, and at that time, as your Honor has just said, he knew the facts in the Pulver case, but where is
1769 there an adjudication that Pulver was the originator?

Judge Baker: What?

Mr. Mayer: Is it wrong for a party—

Judge Baker: It is immaterial whether Pulver is the originator or not, or whether Pulver in turn had stolen it from some other person. Certainly, it is established that Wrigley falsely swore that he was the originator when he knew that he had stolen it from Pulver.

Mr. Mayer: To say that, to make that assertion, your Honor, is to find that Pulver was the originator.

Judge Baker: No, no. One thiew may steal from another thief in a sense. May be the thief from whom the second thief steals hasn't sufficient title on which to base an action for larceny in the second case. As far as morals are concerned, a man who steals from a thief is as bad as the man who steals from the owner.

Mr. Mayer: No doubt about that.

Let me say in answer to that, there is no adjudication that Spearmint was not originated in 1893. We have heard Mr. Aldrich talk about perjury. As a matter of fact, there were a half dozen reputable, unimpeached and unimpeachable witnesses who testified to that fact, including the manufacturer of the labels. But as Mr. Aldrich says, and as your
1770 Honor has just now stated, that is not material in this case. I refrain from saying anything further on that subject, except this, that the Wrigley Company never pleaded the Pulver decree, never asked for any aid, never brought it into court as being something on which to predicate its rights.

Judge Baker: Certainly not.

Mr. Mayer: Now, to take the second suit, the pending one, which involves the Doublemint label against the Wintermint label, that is the case on hearing—the doctrine of unclean hands has nothing to do with this. The name of this case is the L. P. Larson, Jr., Company, and the mere fact, if we concede it to be a fact—

Judge Baker: Well, your bill on the Doublemint was dismissed and because Larson was the originator of the Doublemint package.

Mr. Mayer: No, pardon me. The bill was dismissed, and your Honor so finds, because Judge Anderson did not think that the two marks were alike.

Judge Baker: No. When I am speaking of Larson as being the inventor of the Doublemint package I mean that you are conclusively bound by your allegation that in marks Larson's earlier Wintermint and your Doublemint are one and the the same thing, although when it was proven that Larson's Wintermint was the older, then your Doublemint is taken
1771 from Larson just like your Spearmint was taken from Pulver. That is the reason that bill was dismissed.

Mr. Mayer: Let me say in answer to that, your Honor, there has been a confusion, there is a misapprehension on the part of Mr. Aldrich. He repeated it this morning. It is in print in his brief. He persists in saying that in this Doublemint bill now on hearing, that the Wrigley Company alleged that it found that there was confusion. Now, as a matter of fact, it did not so allege. I am going to read you the allegations, and bear in mind that we are speaking now not of the counter-claim filed by Wrigley, by Larson, in which he alleges a similarity and which similarity is expressly denied in the answer to the counter-claim.

Judge Baker: Am I in error in supposing that your second

bill is based upon an alleged infringement by the Larson Company by means of his Wintermint package?

Mr. Mayer: No, you are right.

Judge Baker: Upon the elder Doublemint package; that was your allegation.

Mr. Mayer: Yes.

Judge Baker: And that the defendant should be enjoined on account of the similarity.

Mr. Mayer: Yes.

1772 Judge Baker: That is what I supposed it was.

Mr. Mayer: Yes, but there was no allegation on the question of confusion. I am referring to that question only in this instance.

Judge Baker: That is a question of similarity.

Mr. Mayer: You are speaking now of the question of confusion, your Honor. "Your orator further averring—that is the Wrigley Company—upon information and belief that a certain number of dealers in chewing gum, both the wholesale jobber and retail dealer, can be found who have purchased said packages of chewing gum known as Wintermint from the defendant for the purpose of palming off the defendant's goods upon the public as the goods of your orator". Of course that is no allegation.

Judge Baker: No.

Mr. Mayer: I read on. "And that", those words "And that", that conjunction goes back to "your orator further averring upon information and belief that these defendants have found—that is, the Larsons—as a matter of fact that the purchasing public makes no distinction between the two packages."

Judge Baker: Yes.

Mr. Mayer: "And that the Wintermint gum product of this defendant can be palmed off on the public and trade
1773 generally as either the Spearmint or the Doublemint."

Judge Baker: Yes.

Mr. Mayer: Now, if the Court please, of course we are dealing now, the suit that you have before you—

Judge Baker: Are you going back and proving that your second bill stated no cause of action?

Mr. Mayer: No. I merely wanted to correct the statement that had been made here. The case that you have on hearing now is on the counter-claim in which the L. P. Larson Jr., Company is the complainant and the Wrigley Company is the defendant. Any unclean hands that the Wrigley Company

may have had in some other suit that it begun against the Larson Company would not give the Larson Company the right to enjoin Wrigley. Larson's right to enjoin Wrigley, you have found.

Judge Baker: Yes.

Mr. Mayer: We will not re-argue it. You have given your reasons for it. You did not find that the Wrigley Company was a wilful, malicious and fraudulent trespasser.

Judge Baker: As I remember the answer and the cross-complaint it has been some time since I have had them before me, but I think in the answer and in the cross-complaint to your second bill, your methods with respect o the acquirement of Spearmint were set out.

1774 Mr. Aldrich: That is correct.

Mr. Mayer: Yes.

Judge Baker: Your method of the acquirement of Doublemint was set out.

Mr. Mayer: Yes.

Judge Baker: And that was set out in the answers of the defense and in the cross-complaint.

Mr. Mayer: Correct.

Judge Baker: As a reason why you should be stopped from using such methods. Of course, when we are dismissing your bill, you can call it unclean hands if you please, it is really for want of equity in your bill, but in the cross-complaint that same conduct stands as the basis for enjoining your unequitable conduct.

Mr. Mayes: Yes.

Judge Baker: The same unequitable conduct.

Mr. Mayer: Yes.

Judge Baker: To stop you from taking Larson's—taking Larson's labels that he sends to you and copying them.

Mr. Mayer: Now, I know that your Honor, Judge Baker, is thoroughly familiar with the opinion rendered on the prior appeal. You wrote it. I don't know whether to assume that the other two judges now sitting have read that opinion recently or not.

1775 Judge Baker: No, I assume they have never read the record in that case.

Judge Evans: I read that this morning. I have read it since this argument started this morning.

Mr. Mayer: In that, then, I am certain here, whatever the decision is, and that I will be understood in what I am saying, I will first call the Court's attention to the return of Judge

Carpenter to the petition to show cause why a writ of mandamus should not issue. That Judge had before him everything that you have. I shall not undertake to read it verbatim but he shows his reason for the decision.

You already know that he entered an order directing the witness Larson to testify on certain subject matters and you know that the witness refused to do so and that an appeal was taken. I shall discuss very briefly the appealability of that order. And that also this petition for mandamus was applied for.

It is immaterial to me, I have not a particle of interest as to whether the appeal is dismissed or not. It is the ultimate merits that we are interested in, and as I said before, I presented the motion for appeal because I thought, and I am absolutely satisfied that it is sound and should be granted.

In the return Judge Carpenter sets up very briefly
1776 the pleadings in the two suits and he refers to the answer filed in 1915 by the Larson Company, which, as Judge Baker has just said, shows that long before the cases were tried, the first and second bill before Judge Anderson, in March, 1917, Larson knew all the facts, knew all about the Pulver litigation, knew that the depositions had been taken, knew that there was testimony on Pulver's part indicating the use of this color scheme, knew that that had been settled, knew that a decree had been entered, knew that the decree on its face showed it was a consent decree, knew that $250,000 had been paid, knew, as he was bound to know as a matter of law that it was a perfectly proper thing to settle litigation, instead of putting on his rebuttal proof, instead of going to an issue as to when Pulver first began to use the Pulver scheme, color scheme, and when he did, knew that in that New York litigation he bought Pulver's business, bought Pulver's plant, a business which was making forty thousand dollars a year, according to the record, that the consideration took in, undoubtedly took into consideration the dispute between them, and it was settled on terms and on its face the Judge that entered it knew it was a consent decree.

Judge Carpenter was not deceived by that in 1915 when
he granted an injunction for Spearmint against Pepto-
1777 mint, because the Pulver matter was then pending and not settled.

Judge Anderson, when he dismissed the bill on final hearing in March, 1917, was not deceived because he was told by Mr. Offield, Mr. Offield then being counsel for the Wrigley

Company, the present counsel having been called in since this Court's decision. And in the prayer for the counter-claim we find just exactly what it was that Larson thought he was entitled to and that Larson wanted and we quote the prayer in the counter-claim, as follows: This is at page 63 of the original transcript of record.

It prays for a restraining order and then goes on, reading verbatim, that the complainant—

Judge Baker: What page is that?

Mr. Mayer: Page 63 of the original transcript. That is the printed transcript that was before this Court on the prior appeal.

Judge Baker: Yes.

Mr. Mayer: "To the end that the defendant and counter-complainant—

(Mr. Mayer then read from page 63 of the original transcript, as follows:)

1778 I read verbatim:

"And that complainant may be compelled to make before one of the Masters in Chancery of this Court a full, true and complete accounting."

Of what?

"Of all profits of every description diverted from this defendant."

Judge Baker: Yes.

Mr. Mayer: "Diverted from this defendant, meaning diverted from the Larson Company.

Judge Baker: Yes.

Mr. Mayer: (Reading further from said prayer.)

Of course, where there were no trespasses they have nothing to account for. And I will come to that later. The Wrigley Company has filed an account—

Judge Baker: You will have to determine the meaning of the word "divert", and you will also have to determine what you mean by the word "trespass".

Mr. Mayer: I will define what I mean by that, your Honor, in the due course of the argument.

Let me say now so that there won't be any feeling that I am avoiding it, I mean by "trespass" a wrong. I mean

1779 that kind of a wrong which this Court has decided, and without which this Court has decided there can be no recovery, namely, unfair competition; that where there is no unfair competition there can be no recovery, and that where the trespasser, even though he had a malicious intent to in-

jure the business of the plaintiff, if he does not actually injure his business, if he does not actually trespass upon his trade or reputation or good-will, if the plaintiff has no trade, reputation or good-will, has made no sales in that territory, then, as I shall quote from an opinion rendered by—

Judge Baker: I get that point.

Mr. Mayer: Yes.

Well, let me go on with Judge Carpenter's answer in his return on the petition for mandamus. Both the bill and answer allege likelihood of confusion, the Wrigley Company's answer to the counter-claim, and seriously deny that the public had been misled or that there had been any confusion between Doublemint and Wintermint products. So that on the issues made by the counter-claim and the answer thereto, notwithstanding the allegations in Wrigley's original bill of likelihood of confusion, yet on the issues made on the counter-claim, Wrigley stood there and said that our goods never were

sold for your, Larson's, goods, that we never tried to
1780 palm off our goods as your goods, and that there has never been any confusion on the part of the public that our goods have been your goods—a situation which is perfectly justified when you bear in mind that over seven million dollars had been spent for advertising by Wrigley prior to that, advertising his Spearmint gum, that he was the largest manufacturer of gum in the world and that his gum was known all over the world and sold all over the world, and that Larson himself, as he himself confesses in this record, was a very small merchant whose sales, although he had testified originally went all over the world, as a matter of fact so far as we have examined him up to date, we have found that they cover less than half of the states in the Union.

Going on with the return, on March 14th, 1917, Judge Anderson on final hearing dismissed these bills and counter-claims for want of equity. The Wrigley Company appealed to this Court for both decrees. I don't know how your Honor happened to think that we acquiesced, Judge Baker?

Judge Baker: Asquiesced in what?

Mr. Mayer: In the dismissal of our second bill.

Judge Baker: Why, no.

Mr. Reed: This first Wrigley case was appealed.

Mr. Mayer: I am talking about the second one.

1781 Mr. Reed: It was not.

Mr. Mayer: Now, I cannot understand it. I say I was

not in the case. But counsel still say it was not appealed and Judge Baker, in your opinion, you said it was not appealed.

Judge Baker: Well, it is not material, is it?

Mr. Mayer: No, I don't think it is, except that it is emphasized by counsel in their briefs, in their arguments, and for some reason best known to Judge Baker he said that Wrigley had not appealed, but the fact is, if you will look at the same original transcript that you have before you, at page 183—

Judge Baker: I think as a matter of fact no formal dismissal or abandonment is entered.

Mr. Mayer: There was a prayer for appeal, an order allowing appeal, errors assigned, appeal bond given, brief written, but I have not seen anything in the record to indicate it. I will say that Mr. Lane himself knows nothing about it, because neither Mr. Lane's firm nor my firm was in the case at that time.

Going on with the return, this Court rendered its opinion on July 30th, 1918.

(Reading Judge Carpenter's return.)

This Court also held that there was sufficient admission in the pleas to make it unnecessary for the Larson Com-
1781½ pany to offer proof of confusion and found that there is a basis for at least the possibility that Larson's diminishing sales came from Wrigley's simulation of the Wintermint package, quoting from your opinion, but that, against quoting from your opinion, in support of the counter claim no proof was made of actual confusion.

I might say that when you order an accounting, that the word "accounting"—no case has been cited and no case can be cited which shows that "accounting" means "profits" and that it does not mean "damages". An accounting may mean either. An accounting means, take the evidence as to what the facts are and when they come in the Court will determine.

I myself was called into a case in which your Honor, Judge Baker, rendered a decree a year or so ago in which you found a defendant was guilty of fraudulently, maliciously and deliberately selling spurious whiskey as being the whiskey made by the plaintiff, and entered an order directing an accounting, and in that accounting your directed that it be taken both as to the damages and as to the expenses incurred by the innocent parties and also as to the profits—not a word, I repeat, nothing to indicate what your Honor was ultimately going to do in that case. Your Honor wanted to be convinced,
1782 sitting as a District Judge, what the facts were. In other words, take the evidence, find out.

Judge Baker: I thought the situation there was such that the scope of the ordinary accounting would be enlarged on account of the finding made at the time, on account of the wilful trespass and the fact that the plaintiff had probably been put to an expense that he should be compensated for, and probably indicating that there possibly might be a situation where the complainant's general reputation might have suffered, and while I could not decide it in advance, there is a settled rule about awarding damages of that kind, to have an order directing that the return be made by the Master and the question of law be argued then.

Mr. Mayer: Precisely.

Judge Baker: Here the accounting means the usual decree. If the Court does not enter a decree, the plaintiff comes back at once to this court and asks us to direct the Judge to render a decree for an accounting of profits. Did Judge Carpenter enter a decree for accounting of profits?

Mr. Mayer: He did.

Mr. Aldrich: He did.

Mr. Mayer: They are not complaining about that. We are not complaining about that at the present time, your Honor. They are not complaining on that subject. He is complaining that the decree is not being complied with by the Master and by Judge Carpenter.

Judge Baker: Yes.

Mr. Mayer: He is not complaining of that decree. He says that decree is right.

Mr. Aldrich: You say it is right.

Judge Baker: Yes, he is entitled to the profits.

Mr. Mayer: Profits from what?

Judge Baker: Yes, he is entitled to the profits.

Mr. Mayer: Profits from what?

Judge Baker: What?

Mr. Mayer: Profits from what?

Judge Baker: Profits from your sales as trustee ex maleficio.

Mr. Mayer: An innocent infringer is a trustee ex maleficio.

Judge Baker: What? Granted.

Mr. Mayer: An innocent infringer is a trustee ex maleficio, just as well as a wilful infringer.

Judge Baker: I say for the sake of the argument that that would be granted, that there would be no distinction. If there is a distinction, Wrigley is not an innocent trespasser.

Mr. Mayer: It has not been so found.

Judge Baker: It has been found.

Mr. Mayer: I beg your pardon. This Court has not
1783 so found.

Judge Baker: Oh, yes.

Mr. Mayer: I want to be heard on that.

Judge Baker: Oh, yes.

Mr. Mayer: An innocent infringer does not have to pay any profits. The Supreme Court of the United States gas so held, but before your Honor comes to a conclusion—

Judge Baker: Well, you should present a motion to have Judge Carpenter's decree corrected, that it was erroneous in including profits.

Mr. Mayer: Possibly we may when the time comes. He has not entered an award yet.

Judge Baker: He has entered a decree and that decree has been in accordance with the mandate of this Court.

Mr. Mayer: This Court has not entered, has not written a mandate telling the District Court what kind of an accounting to take. You left the matter open in your decision. I challange the Court or counsel to point out a single word in that opinion of this Court which says what kind of an accounting shall be had. And bear in mind in a mandamus proceeding it must be clear.

Judge Baker: Oh, well, may be, if that is your position, we will make a mandate—

Mr. Mayer: I don't think you will want to do that
1784 after you have heard the discussion and read the brief and the argument.

Judge Baker: Oh, may be not, but if that is the objection, if there is an ambiguity in what we were trying to do—

Mr. Mayer: Not an ambiguity but a failure to decide. A mandamus will never issue from this Court to tell another Court to decide something that you have not yet decided.

Judge Baker: No.

Mr. Mayer: I shall point out to your Honor from your Honor's own opinion when I come to it that you did not decide the question of accounting, that you had not any intention of deciding it, and that you could not have decided it if you wanted to. This Court is committed to that doctrine. This Court has held that five or six or seven times.

I just want to interrupt for a moment the reading of this return because I don't like to have, if I can avoid it, any one member of the bench listen to my argument with what I conceive to be a mistaken principle of law.

Now, I have said that this Court—I have before me, three or four, or five, at least six decisions of this Court to the effect that the question of an accounting is something wholly beside the merits of the case, that the question of an accounting has nothing to do with the question of liability on
1785 the merits. That all that you decided was, and it could not have been more than what the Judge, Judge Anderson, had before him, and he said that there was no similarity between the labels, no equity in Wrigley's bill, not equity in the counter claim, and he dismissed them.

When that case came to you the only questions for you to consider, the only questions you did consider were, has the plaintiff, Larson, got a title to this color scheme or has Wrigley got it? Who is the older and how has there been an infringement? And when you came to the conclusion that there was an infringement and that Wintermint was older and you disagreed with Judge Anderson, you reversed it, For what purpose? To enter a decree in accordance with your opinion. The words used were "An injunction and an accounting". And the mandate that you sent down was to the same effect with the additional words "And take such other steps as according to law and justice may seem proper."

Now then, for you to undertake now to determine what kind of decree should be entered, or for you to have determined or undertaken to determine at that time—of course I need not say you would not undertake to determine it to-day unless you thought you had the right to do it in July, 1918, when you decided the case. If you did not have the right then I think it will be conceded you haven't got it
1786 now.

So, looking back at it at that time, did you have the power to say what kind of an accounting there shall be, as to the extent of it, as to whether he may show any exemption of the profits that he earned, and whether he may assume the burden and show and subrogate the profits that he made on sales in competing territory and on sales in territory where Larson never intended to enter, and by sales made by us to persons who buy our goods out of choice, who heard of both Larson's and ours and did not want to chew Larson's gum, if you say that we can't segregate such sales, then this Court is deciding a question that has never been decided in the District Court and it is elementary. And if there is any doubt about that I will draw your attention to a case

in the Supreme Court where they say that every party is entitled to a decision of the facts in the first instance by the trial court and that this Court sits as a reviewing Court and for this Court to say that it can determine what kind of an accounting is to be had is to determine a question that was never determined in the District Court and would be depriving us of an opportunity to be heard.

And before I get through, also, I will demonstrate to your Honor, that in cases writen by this Court it is pointed
1787 out that it has always been the opinion that the wrongdoer shall not have to pay anything by way of damages or profits in a court of chancery by way of punishment.

Now, bear in mind, it took Congress to cast upon the infringer, the wilful infringer, not only the profits which he earned from—what? From the infringement, of course, but also allowing triple damages. It took Congress to make the same allowance in case of a trade mark. This is a case of unfair competition. It involves no trade-mark, involves no patent, involves no act of Congress. It is a matter of common law. It is a matter of precedent and the precedents are abundant, precedents fixed by this Court, that the decision on the merits as to infringement or no infringement, as to title, does not involve the question of an accounting. And because your Honor, Judge Baker, put that question, let me direct the Court's attention to a case that was decided—

Judge Baker: Why, of course, there never could be an injunction unless the facts of the infringement and the threat of probable continuance of the trespass are established. That fact being established give the basis for a right to recover all damages that have accrued from the acts of trespass. Of course evidence has got to be had as to the extent of the recovery. The finding of trespass is not simply a find-
1788 ing from nothing. The finding of facts from the evidence shows when and where and how and the general character of the trespass, so that on an accounting the person cannot raise anew either the fact of trespass or the character of the trespass. That has been covered by a finding of fact made in the injunctional part of the case.

Mr. Mayer: It has not been. The Court never did.

Judge Baker: It may be that in this case that the defendants in order to have a basis for raising the question of law would be entitled to have the record separate out the territory in which Wrigley made the sales into two classes, one

in which Larson had an established business, and the other in which he had not an established business. That may be.

Of course, in the Hanover case there is an expression there that has to do with the right of the injunction, namely, where one is asserting as a claim the existence of an established trade, the mere fact that he has a trade-mark does not carry his established trade beyond the real limits of that trade. The fact that he has a mark—a mark can't travel of itself. Now, a man has appeared in another territory with the same trade-mark. The first man has no trade in that terri-
1789 tory. As a mater of fact there is no competition, no, because the trade has been limited to one territory, and in the other territory they have not come into collision. That does not necessarily bear on the limitation of the rights of the plaintiff where there has been a collision. Suppose there is a collision in merely what we will call the Chicago territory and the defendant has taken the plaintiff's name—I don't mean merely a colorable imitation, but taken actually the plaintiff's name, taken actually the plaintiff's label, and has gone off to New England, where the plaintiff had never had any trade. Now, on the principle that a man who commits a trespass of that character, which on its face is inexcusable, which cannot be an innocent trespass, which on its face is a wilful, deliberate trespass, he goes down to New York, and it is shown that in the New York territory he made certain profits, now, he may be entitled to have some sort of a basis laid down in that case, for the trial court to decide preliminarily, request it, whether the plaintiff is entitled to the profits of this defendant who took the plaintiff's name and label in Chicago and traveled off to New York, and an accounting, but in the Hanover case there is no basis, in my mind, for any contention that he would not be answerable.

Mr. Mayer: That he would not be what?

Judge Baker: That the defendant would not be answerable.

Mr. Reed: Would not be answerable.

Mr. Mayer: Would not be what, your Honor?

Judge Baker: Would not be answerable.

Mr. Mayer: Answerable, your Honor, oh, yes.

Judge Baker: By answerable, I mean, he would have to pay over what he had made over in the New England territory out of the property that he had taken in Chicago territory from the plaintiff in Chicago territory and had gone off and used it. That is, a defendant who would take a man's

horse in Chicago and carry him over into Indiana and there to make a profit out of him by renting that horse out, and he comes back, the plaintiff, the owner of the horse, might conceivably hold the defendant liable for the profits that he has made from that horse over in Indiana.

Mr. Mayer: Am I interrupting your Honor?

Judge Baker: No.

Mr. Mayer: I think I can straighten out the difficulties in what your Honor has said, because your Honor has supposed a case that is identical with one that the Supreme Court has passed on, that I was coming to, and that is the case of *Strauss* v. *Notaseem Hosiery Company.*

I will discontinue reading from Judge Carpenter's return for a few moments, because I am very anxious, if I can,
1790 to have your Honor, Judge Baker, get what my views are on the law applicable to such a case as we have at bar.

First let me say, because I happen to have before me a case referred to in the brief and it is germane to what I was saying before. The brief refers to Federal decisions showing that the issues are entirely different between guilty and not guilty, between title and unfringement, and the question of an accounting and that until the defendant is found guilty to have a mark inferior to the plaintiff's mark and having used it fraudulently, and until the injunction issues and the plaintiff's rights are established, you don't get to the question of accounting or no accounting or as to the extent of the accounting or nature of the accounting, whether it shall be profits or whether it shall be damages.

That thought is so well stated in a decision referred to in the brief and in view of some of the suggestions made I hope I will be pardoned for reading a few sentences from it.

The case charged several corporation defendants with infringing and with conspiring to infringe, and in discussing the suits in equity to recover profits and damages for infringement of letters patent the Court used this language:

1791 "In such a suit the granting of the interlocutory decree, if there be one, marks the divisional line between the introduction of evidence touching infringement for the purpose of obtaining or preventing the granting of such decree and the introduction of evidence as to infringement before the Master to establish the amount of profits or dam-

ages. It does not follow that because one act of infringement was the result of conspiracy or of control, authority or direction on the part of the defendant, that all others were. If upon a separate hearing before the granting of an interlocutory decree it should be determined that a single act of infringement was committed—which so far as infringement is concerned is all that is required to support such a decree—under conspiracy or pursuant to control, authority or direction, manifestly that determination should not control the action of the Master in dealing with the evidence of acts of infringement committed under circumstances different from those found to exist by the Court on the separate and preliminary hearing and justifying an interlocutory decree."

1792 So here. Take what Judge Baker found, that there was enough in the confession to show likelihood of confusion, let us take that confession or admission, which was made in July, 1915, would that admission bind the Wrigley in an accounting for profits so that they can't be heard today that sales made after they made that admission were not subject to confusion? Would an admission made in July, 1915, affect future sales made from 1915 to 1918, the end of the period for which we must account?

Again, I was not real sure before whether every member of the Court now on the bench had participated in decisions on any such matters as we have been discussing, but I find a recent decision in which the Court is composed, as it is now, in confirming a decree by Judge Sanborn, who found a defendant guilty of a patent infringement, ordered an injunction and an accounting of profits and damages, and after referring to the infringer's conduct as reprehensible this Court said that it is for the District Court to determine upon the accounting, I am quoting now, "whether damages in excess of the compensatory damages shall be awarded, as well as the amount thereof."

Mr. Aldrich: What is the case there, Mr. Mayer? You forget to give us the cases.

Mr. Mayer: *Pollock* v. *Martin Gauge Company,* 261 Fed. 201.

1793 Judge Evans: Mr. Mayer, let me ask about the exact situation that was before Mr. Morrison. After this order that was made in this Court reversing that and directing an accounting, after that was made, there wasn't any

question by reason of the pleading but what the accounting could be for profits, is there? The word "damages" used in the cross bill could be such a term, especially in connection with the other expression, "such other relief as may be proper."

Mr. Mayer: The prayer called for both, but only for such as were diverted from the Larson Company.

Mr. Reed: I must correct that statement, Mr. Mayer. It does not call for that. It calls for—

Judge Evans: That is not what I am interested in, at least not at the present time. But in view of the prayer for relief, and any language that may have been ised there, there can't be any question but what the Court could render a decree on the profits, if the pleader had asked for damages and "such other relief as may be proper". In view of the words used, as meaning money judgment for invasion of rights or for tort, the court could grant such relief as it saw fit.

Mr. Mayer: Yes, it was an open matter.

1794 Judge Evans: The decree directing an accounting, as I understand it, was followed in this particular case by an order or a decree in the lower court calling for an accounting.

Mr. Aldrich: Of profits.

Judge Evans: Of profits.

Mr. Mayer: Accounting for what?

Mr. Aldrich: Of profits for sales in the infringing dress.

Judge Evans: Then you go before Judge Morrison on the introduction of evidence by the successful party, the defendant as it happens to be in that connection, but really—

Mr. Mayer: The plaintiff.

Judge Evans: The complainant, or the party seeking the decree. Then this question came up as a man was on the witness stand, and he was introducing evidence—

Mr. Mayer: It came up this way, your Honor—

Judge Evans: They had not completed their evidence yet, had they?

Mr. Mayer: The Wrigley Company had filed its account showing all of its sales and its deductions.

Mr. Aldrich: Taking a loss of $286,000.

Mr. Mayer: And showing a loss of $286,000. They filed their objection to that, claiming that the advertising expense was not allocated properly. Of course, that is a ques-

1795 tion that will have to be decided.

They then put on their proof, under equity rule, I

think it is, 63, if I remember it, which permits them to examine the party that is accounting. And then it appeared to them that sales were made by a Canadian corporation, not a party to this suit, and by an Australian corporation, not a party to this suit, were not included in the sales for which the William Wrigley, Jr., Company accounted.

They asked the Master to direct and order, to send out an auditor to make that examination, and to order us to account for that. There was a suggestion as to whether that should be done then or whether we should finish the hearing that was then on, and the Master said, "We will take that up now." I said, "Very well. We have two defenses as to that, and we want to be heard." First, the question of law. We claim that these corporations are not agencies, that they are not mere branches. They are separate legal entities. Mr. Aldrich is mistaken. He still persists in the mistake when he says that the majority of the directors of the Canadian Company are directors of the Wrigley Company. The Wrigley Company that I am appearing for, that I am speaking for, is a West Virginia Company.

I told the Master then that our position was as a
1796 matter of law that these companies were organized in good faith during the war, that there could be no exporation of gum over there, the duties were too high; there was no actual control over them; they were separate, independent companies. I also said, even if they were not separate, independent companies, even if they were made parties to this suit, still they ought not to be compelled to account because the sales of Doublemint gum in Australia could not by any possibility be sales for which the Wrigley Company would have to account; that we had been selling in every civilized country on the globe, we have been selling in China, Japan, and in countries I never heard of before, and we proposed to show that they did not do business there, that they had not the means or the facility or the plant or the capacity, that they were never known there, that they had never sold anything there, and did not intend to go there. That the reason why we wanted to prove all those things was so that it could not be claimed that we went out there to forestall, being guided by a decision by this Court and of the Supreme Court in the Hanover case, and also in the *Strauss* v. *Notaseam Hosiery* case, and in other cases, and we propose to show affirmatively in this record that when we

went into China we went there in good faith, and we will show your Honor the authorities.

1797 Judge Evans: I don't care for that now. I simply got the theory.

Mr. Mayer: May I have one sentence further? Mr. Aldrich disputed our right to do that. The Master held we were entitled to do that. Mr. Aldrich then stated if that kind of evidence were received at all we could go into it then at that time. Does that answer your Honor's question?

Judge Evans: That last is what I wanted. Now, the reason I brought that out was, it might have been, in view of the theories that he had, and in view of the fact that the Master was receiving the evidence to subsequently submit it to the Court, so that the decree might be entered thereon, that the condition that Judge Baker suggested would take place, namely that the profits of the sales that were made in one locality where Larson did business would be separately reported from that where he did no business.

Mr. Mayer: Exactly.

Judge Evans: But they introduced their proof and asked you to account for the Canadian profits and you interposed the objection that if you proved a certain thing then they could not go into that account at all.

Mr. Mayer: It was agreed that we could go into it at that time if the Master held it is proper at all.

1798 Mr. Aldrich: We made our objection.

Mr. Mayer: Their objection to the competency and relevancy and materiality was made.

Mr. Aldrich: And jurisdiction.

Mr. Mayer: Yes.

Judge Evans: Any kind of an arrangement that made for the better presentation of the report of the Master might be considered, but if it was going to be received for the purpose of barring them, barring their inquiry into your transactions—

Mr. Mayer: Oh, no, not at all.

Judge Evans: In Canada—

Mr. Mayer: The case is still pending before the Master.

Judge Evans: That rather seems to be his theory, that he was going to receive this evidence of Larson's, to show that he was not transacting business there, for the purpose of preventing Larson from making any claim for profits against your Company.

Mr. Mayer: That is it, exactly, as a reason why we should not account for the Australian sales, even if that corporation were owned and controlled and an agency and a part and a branch of our business.

Judge Baker: Does Judge Carpenter's entry that he made limit or modify in any way the Master from going ahead
1799 and reporting on the profits of the Wrigley Company made in Australia from Doublemint or in Canada or other places?

Mr. Mayer: No, on the contrary; following out Judge Carpenter's order will permit that to be done. If these gentlemen maintain their position now it will not be done. In other words, they made a cross motion to strike out all of the evidence that had already been introduced on this subject, to show when he first entered certain territory, what the extent of his business was, they want all of that out of the record. There is some in the record already. If you dismiss this petition for mandamus, you will be permitting the record to be made—

Judge Baker: Yes.

Mr. Mayer: And we will go before Judge Carpenter with it, from which he can say that in this case, if the Court please—of course, if there are no profits that ends it. If he should sustain their objection as to the method of allocation, let us assume that the profits were $100,000, he can say that $90,000 are profits made possible by sales in territory where Larson did business, in common territory.

Judge Baker: The Master can find that then.

Mr. Mayer: The Master can do that. That is exactly what this evidence is for, and also for the purpose of showing that we did not go into any territory for the purpose of forestalling him.

1800 Judge Evans: I think you said when I was asking you the question, that they were attempting to show that the report which showed a loss, the total business, did not include the Canadian and China business, or somewhere else.

Mr. Mayer: It is conceded.

Judge Evans: That he wanted to go into that and you stopped them from doing so, interposing two defenses, one being, that it was another corporation, and the other defense being that this man was not engaged in business there. If you are right in that, there would not be any need for it.

Mr. Mayer: That is right. That is the situation. In other words, we account for, I think, twenty or thirty million dollars of sales. We did not purport to account for sales made by these foreign countries. They turned around to Master Morrison, and said, "We now want an order on them to include the sale of the two companies", to which I replied as already stated. There is a legal objection to that.

Judge Baker: Do you mean that the Master ruled as a matter of law on that?

Mr. Mayer: No, either party can go to the Court on that.

Judge Evans: I can't see if you introduce your proof at this time, that that would interfere with the duty of
1801 the Master, to go on into the investigation of your sales in Canada and China.

Mr. Mayer: I am not saying that. I understand that, your Honor.

Judge Evans: You stated that when these gentlemen sought to inquire into the sales in Canada and China—

Mr. Mayer: By companies in Canada and China—

Judge Evans: And in Australia, that you then indicated to the Referee that that inquiry was not pertinent, for two reasons. One was that it was a separate company and the other was that it was a territory which Larson had not yet invaded.

Mr. Mayer: And further, never intended to invade and was not known there.

Judge Evans: Never intended to invade and was not known there.

Mr. Mayer: That is correct.

Judge Evans: I say, I can't see what that proof would have to do with the duty of the Master in investigating this on the two theories that he was to report, first, upon the business of the foreign Company where the Larson Company was an actual competitor, and the other one, as to the business of the Wrigley Company, involving the particular dress that you speak of in territory that Larson had not invaded.

1802 Mr. Mayer: If the Master comes to the conclusion that this evidence should be received, so as to be in the record, so that Judge Carpenter can review it, so that you can then review it, the next question he will have to receive evidence on will be, why were these corporations organized, who owned the shares of stock, who are the directors, are these companies branches or are they not?

Judge Baker: Yes. The Master did go into all that.

Mr. Mayer: That is what he is doing.

Judge Baker: Yes.

Mr. Mayer: Now, whatever he said—whether he said—

Judge Baker: I understood your adversary to state, and it seems to me it should be covered by a stipulation before the Master, that they had not made sales in Australia or Canada.

Mr. Mayer: The fact is, your Honor, I tried to get that admission, and I want to dispute the statement by Mr. Aldrich to the effect that he then admitted that they did not do any business there.

Judge Baker: It ought not to be a hard matter to stipulate just a territorial line, of how far the Larson business had reached. The question of intensity is not material, as I look at it.

Mr. Mayer: No, it is faith. For instance, the record
1803 also shows, when we examined him as to where he made his first sales that he falsified his books.

Mr. Aldrich: That is not true.

Mr. Mayer: I say it is true. Judge Carpenter has said it in his return, so you do not need to take the biased judgment of counsel in this case. But on the subject of stipulating, your Honor, what we want to do is to get in that proof. Now, as to the foreign countries, your Honor, I never could get Mr. Aldrich to make an admission beyond the following words, "We only made a few sales in Canada." I never could get him to admit that they made no sales. I never could get him to admit that they did not intend to go to those foreign countries. I won't rest my case and come up here again, if I can avoid it, merely on a showing that a few sales were made.

Judge Baker: Of course, you can't get them to stipulate that this man back in 1914, or whenever it was, you began this litigation—when was that first bill filed, 1914?

Mr. Mayer: The first bill has nothing to do with what is on hearing now. The bill on hearing was filed—

Judge Baker: The first bill has something to do with the actual fight that will uptimately have to be made on this forestalling proposition.

1804 Mr. Mayer: The first bill was in 1905.

Mr. Aldrich: Will you permit an interruption to set you right?

Mr. Mayer: Yes.

Mr. Aldrich: By reference to the record?

Mr. Mayer: Certainly.

Mr. Aldrich: On page 23 of my argument, I say, first, to this question of whether we had sold the gum in Australia or Canada—

Mr. Mayer: What is the date of the argument?

Mr. Aldrich: April 18, when the question was up and argued at length, when I say, on this question of whether we had sold gum in Canada or Australia, "I wish to be under stood that I don't care whether we had or not. In fact, as I understand, we have sold some gum in Australia and only a few sales in Canada, if any. Now, that does not end it there. It is unfortunate to have to have a controversy of this kind." That is on page 23.

Judge Baker: It is the Master's duty to go ahead with this investigation of the sales of the Wrigley Company everywhere in the world that the Wrigley Company has made sales. Now, in order to have your question of law decided, according to the correct application in this Hanover case,

you are entitled on your side to have them stipulate,
1805 and if they won't, you prove that they had not made
any sales in Australia or had not made any sales in Canada.

Mr. Lane: That is the whole controversy.

Judge Baker: Then you would be entitled, of course, to present your evidence and they their evidence on their side about when and where and how the Canada corporation was organized, and when and where and how the Australia corporation was organized.

Mr. Lane: That is exactly what the trial court held.

Mr. Mayer: That is exactly what the trial court held.

Mr. Aldrich: No, he did not hold it.

Mr. Mayer: There is one step further. May be when your Honor gets that, may be you can send us away and may be we can get what we want. This very question arises, what we are arguing now, because of their desire to have the Wrigley Company file the return of sales of these foreign corporations, but we took the position that this territorial use ran not only to the foreign coroprations but to the United States, that, if, for instance, we sold in Texas before he was there and under circumstances that would satisfy the Court that he never intended to go there, that then we have a right to show that, we have a right to show all the territory.

Now, in the Hanover case, your Honor emphasizes,
1806 your Honor pointed out, and the Supreme Court adopted that, you went into the places, a sale here, a little sale there, the first sale in that territory, the first sale in Alabama, the second sale in that territory, and it was on that very type of evidence that the case was finally decided. And subsequently in the *Strauss* v. *Notaseam* case which was an unfair competition case, where the defendant was a wilfull trespasser, innocent at first but was warned just as they say we were, and where the Supreme Court said from the time he was warned he was a fraudulent trespasser and must account accordingly, and the Court below read profits into it, the Supreme Court said that notwithstanding the fact that the defendant was a wilfull trespasser and was perpetrating a fraud and a wong on the plaintiff, the plaintiff is entitled to an injunction, but is not entitled to profits because it appeared from the facts in the case, facts of the type that we are trying to prove here, that the defendant did not go into virgin territory for the purpose of forestalling the plaintiff; that the territory in which he sold was not territory that the plaintiff had any business reputation or good will in.

Judge Evans: You think that is what was held by the Master? I should think that the effect was just the opposite.

1807 Mr. Aldrich: Yes, if the Court please, it is.

Judge Evans: That he held that this man must first show business in that place and you had a right to examine him before they could show your business in Canada and Australia.

Mr. Mayer: He had already testified that they did business all over the world, that they did business.

Judge Evans: They were introducing their proof and they were trying to get you to show what your total business was and what your expenses were.

Mr. Mayer: Yes.

Judge Evans: When you made your statement of expenses and business in the United States, they asked you for a report on Canada and elsewhere.

Mr. Mayer: Yes.

Judge Evans: You said—"We do not want to give that because these people were not engaged in that business there —two reasons, one was that it was another corporation, and they were not doing business there". And the Court said,

"I will make you show that first, in effect saying that if he was not doing business in that market, you did not have to report.

Mr. Mayer: The question that we are debating here with you is not that question at all. The question is whether
1808 it is proper or improper, whether it is like testimony in a divorce suit, to make Larson—to prove for us to segregate our business, when we tried to show—

Judge Evans: When your testimony was being put in?

Mr. Mayer: Yes, certainly.

Judge Evans: It seems to me that you should then try to show that this man was not doing business in these localities.

Mr. Mayer: Precisely.

Judge Evans: But they were introducing the proof, and they were entitled to your figures.

Mr. Mayer: It was stipulated in the order of proof that, finally, we were entitled to prove where he was doing business and how much business he was doing.

Mr. Lane: We paid the expense of that proof, in the first instance.

Mr. Mayer: At one of the very earliest sessions, after having consumed something like two days in argument, the Master ruled, I am reading now from an exhibit attached to Judge Carpenter's return, April 23, 1919,

"The Master: It seems to me that the Wrigley Company has a right to know the volume of business." (Reading)

"And that those questions might have been reached
1809 and solved much easier than we are solving them."

He evidently had in mind what Judge Baker just said. (Reading further from exhibit.)

It was not until then, when we started to find out where the first sale was made and he testified that the first sale of Wintermint was made in December, 1913.

"Q. To whom?

"A. To the Fremont Bottling Works.

"Q. Will you produce your books showing it?"

He thinks he has them there. We asked him the question. He leaves the stand to consult with Mr. Aldrich privately without permission. He finally remembers that as a matter of fact it was not a sale of Wintermint at all but it was a sale of Peptomint.

Then when we asked him to produce his order slip for that, and his cash book, and when his second sale was made,

then they refuse to give any further information. That is what focused this thing, that is what brought on the crisis.

Now, Judge Evans, I agree in what you say, to the extent that it may be that before this case is through, if the Master finds that these corporations are agencies of the Wrigley Company that all this proof should be in the record,
1810 but the question that your Honors have to pass on now is not that at all. It is a question of whether it is proper, or whether it is inconsistent with your decision and with your mandate to permit us to prove that of our ten million dollar sales, nine million, if you please, were in territory where the Larson Company was never known, never had any sales, did not have plant, facilities or intention to enter that territory. We want the record to show that so that when we come before your Honors again, if there ever is a money decree against us, we can make the same argument that was made in the Hanover case.

In that connection I want to read a few passages from what—did your Honor say anything?

Judge Baker: I was looking at the clock. We will adjourn until a quarter past two.

Whereupon a recess was taken to 2:15 o'clock P. M.

1811 In Re Petition of L. P. Larson, Jr., Company { No. 2831 No. 2822

October 29, 1920,
2:15 o'clock P. M.

Court met pursuant to adjournment.

Present: Same as before.

REPLY ARGUMENT BY MR. MAYER CONTINUED.

Mr. Mayer: I want to straighten out one or two matters that were left this morning not entirely to my satisfaction because of questions put to me by two of your Honors, addressing myself more particularly to the question of Judge Evans.

I want this Court to understand that we are not trying to control any question of the order of proof, and no such question is presented in this Court. The great question be-

fore this Court is simple. We have put a witness on the stand asking him certain questions. If that violates the decision of this Court he ought not to do it. You ought to stop it. You ought not to bother about questions of pro-
1812 cedure.

But this Court should not interfere unless this Court has already decided in this case, as the law of this case, that the Wrigley Company must account for profits and not for damages, and, second, that they must account for all profits regardless of where made, and, third, that after having accounted for the profits regardless of where made, they must pay those profits, and that they may not show any exemption of those profits, profits on sales made in non-competitive territory, profit on sales made that were not trespassing sales, profits on sales that did not interfere with the good-will or the trade or the reputation or the business of the plaintiff.

If this Court in the present case has already so decided on its prior appeal, then this Court could act. But unless this Court has already so decided it should not act.

Neither Judge Carpenter nor the experienced Master has been able to find a single word in the opinion of this Court showing that it decided those questions.

Judge Baker: Well, about the first question, I should say that that will be held to have been decided, that the plaintiff was entitled to profits. As to the other question—
1813 Mr. Mayer: Well, we contend that is sufficient for the purpose of this discussion. Even if this Court had held, which we say it did not, that the Wrigley Company shall account for profits, even reading that into your opinion—

Judge Page: Let me find out out whether I understand the situation. I understand that it is contended by Mr. Aldrich that when the Court here decided the question and ordered an accounting of profits, that meant profits, and that that meant profits anywhere and everywhere earned by the use of the thing that was—

Mr. Aldrich: By the infringing article.

Judge Page: Yes, and that the question as to whether—

Mr. Mayer: Wrigley.

Judge Page: Yes, the defendant in the suit below, or this suit, did business in that territory was of no consequence.

Mr. Aldrich: No, not at all.

Judge Page: I understand on your part that you contend

that you should not pay any profits; that the question was not determined by this Court as to what the profits were, but simply was a question of taking an accounting; and that it was not the Wrigley Company that was doing busi-
1814 ness in those territories inquired about, that is, Canada and Australia, but it was some other corporation; that if even if it was the Wrigley Company that they should not account; that there being no competition there, that you would not be liable to pay those profits if you made any; and that the question of the order of proof has been waived by both of you; that is, even though you did not have the right to put the proof in at that time, in that manner, that feature of it was waived, if it was a proper question to bring out.

Mr. Mayer: I think your Honor has stated it correctly.

Mr. Aldrich: That is true, with this modification, that is, that the Master would not rule that they should file any accounting as to Canada and Australia until he had heard this kind of proof.

Mr. Mayer: And until, also, he had heard the proof that we are going to put in to show that we were not in control of those companies. What the Master will ultimately decide, as to whether he will decide—

Judge Baker: The Master's duty is to put in whatever basis there is for the respective contentions.

Mr. Mayer: That is it.

Judge Baker: Counsel ought not to waste their time
1815 and the time of the Master and everybody else by trying to prevent that being done.

Mr. Mayer: We are not trying to prevent that. They are the ones that are doing that.

Judge Baker: They are not contending that they are not entitled to go into the question of profits at all. You have been making that contention since this morning.

Mr. Mayer: No, I beg your pardon. We have filed our account.

Mr. Lane: The full account.

Mr. Mayer: The full account has been filed long ago.

Mr. Aldrich: Showing a loss of $280,000.

Judge Baker: You were stating since luncheon that there was no occasion by virtue of the mandate of this Court for the plaintiff to insist that it was entitled to hold you for profits.

Mr. Mayer: As one argument to show why the mandamus should not issue.

Judge Baker: I say, you ought not to spend any time on such matters. They are contending that they are entitled to profits. The Master should furnish the basis on which, first, the trial Court and then this Court can determine that position of the plaintiff. You are entitled to have such evidence and such a report, from the Master as will
1816 enable, first, the District Court and then this Court to pass on the correctness of your contention.

Mr. Mayer: Precisely. That is exactly our position.

Mr. Lane: That is all there is to it.

Mr. Mayer: If I have said anything to indicate our position is different, I have been misunderstood. I am contending here that the Master—

Judge Baker: I have understood that you were insisting to the Master in the first place that the decree of this Court did not authorize him to go into the question of profits at all.

Mr. Mayer: Oh, no.

Mr. Lane: No, no.

Mr. Mayer: No, I am misunderstood on that.

Judge Baker: What is the purpose of making your contention that you made since luncheon, that that is not within the decree of the Court?

Mr. Mayer: Let me re-state it, your Honor, because I have been misunderstood. This is an application for a mandamus, in which you are asked to direct Judge Carpenter how to decide a particular question. If he has decided any question that this Court has decided—

Judge Baker: Yes.

1817 Mr. Mayer: —in this case,—

Judge Baker: Yes.

Mr. Mayer: —in conflict with that decision—

Judge Baker: Yes.

Mr. Mayer: —there is a remedy—

Judge Baker: Yes.

Mr. Mayer: —that you will very quickly enforce.

Judge Baker: Yes, and a little bit farther. If the Master is not proceeding to do what in fact we told him to do we will direct the District Court to see that the Master does it.

Mr. Mayer: Surely, surely, that is it exactly.

Judge Baker: Except on the basis, that you indicated, to have the Master exclude this matter of profits, I fail to understand why you have been arguing this morning, or

arguing since luncheon that the decree rendered by this Court did not command the Master to go ahead and discover the profits that the defendant had made out of Doublemint.

Mr. Lane: May I make this one statement, your Honor? There is only one question. We filed a complete account, of course, we filed them covering everything.

Judge Baker: Yes.

Mr. Lane: That the Wrigley Company had.

1818 Judge Baker: When it is shown that they did not cover your sales, speaking now from the plaintiff's point of view, the sales of the Wrigley Company through corporations which it created for selling purposes, thereupon it was the duty of the Master to have you proceed to state what those profits were.

Mr. Lane: He is just trying to do that. I want to be sure that we are clear on this. What the Master has done here is just to ascertain, on that point, whether these parties have any relation to the present Wrigley Company, or are within the jurisdiction of the Court. The Master has taken testimony on that question.

Judge Baker: Well, he is taking testimony, but he should take the testimony and he should comply with the order.

Mr. Lane: He has already said, if he sees any sign of relation he will order that particular thing. He has already said that.

Judge Baker: He said what?

Mr. Lane: He said he will order that, if there is any showing of relationship between the parties.

Mr. Mayer: He is taking evidence on that now.

Mr. Lane: He is taking evidence on that now.

Judge Baker: He must take the evidence. It is im-

1819 material how he views the law on that evidence. He must take the evidence in order that the District Court first, and then this Court—

Mr. Lane: That is just what he is trying to do, your Honor.

Judge Baker: (Continuing) may say what is the legal effect of that.

Mr. Lane: He is now taking that evidence.

Mr. Mayer: He is taking it.

Judge Baker: Then you ought to be down there before the Master.

Mr. Lane: That is what we think.

Mr. Mayer: That is just what we think.

Judge Evans: Just a minute, may I ask a question of Mr. Lane? How does any inquiry as to whether Mr. Larson is doing business in Canada or Autsralia bear upon the question of whether these companies were separate and distinct from the Wrigley Company?

Mr. Lane: They do not have anything to do with that proposition, your Honor.

Judge Evans: I was asking that because you said the Master was inquiring into the business done in Australia or Canada.

Mr. Lane: Well, we were going into that proof. Per-
1820 haps you don't understand—

Judge Evans: In order to go on with that proof, you inquire what Mr. Larson was doing.

Mr. Lane: No, as we got along, developing that question, it came up to the question of whether there was competition or no competition between the parties anywhere. On that theory of the case, when we got into that, then the other side said, "Why, we don't make any point on the order of the proof of that question," and from that time on we agreed to pay the expenses of the Master, the charge the Master is making, the stenographer's expenses, and put that in as part of the case because it sort of led right on from the other proof, that is all.

Judge Baker: Yes, but all the basis for your insistence that if you got the Master to believe that these were stranger corporations in Canada and Australia that he would not—

Mr. Lane: Oh no, your Honor.

Judge Baker: (Continuing) that he would not develop the profits.

Mr. Lane: No, that is not the proposition.

Mr. Mayer: No.

Mr. Lane: We were going on the theory—

1821 Judge Baker: And you proved that the Larson Company had never yet been able to extend its business beyond thirty-six states of the Union and not at all into China, Australia or Canada, that thereupon the profits except within the thirty-six states should not come within this question.

Mr. Lane: That is not a fair statement. We have put in all the parties. That is, we filed an original account covering not only the territory where they were, but we put in every foreign country. That is all before the Master. The Master has been very strict in ordering every bit of that in.

That is all right in there. The only question now is that the Master would, if this were allowed, prevent us from putting in certain testimony relating to the ultimate question that we are to argue here, that the are not entitled to an accounting of profits in territory where they did not go. But that had nothing to do with the question of whether the Master should order that proof in.

Judge Page: Has he ordered the other accounts, the profits through the Australian and Canadian corporations?

Mr. Mayer: We have not decided that question yet.

1822 Let me read you the stipulation.

Judge Baker: Well, he should go ahead with that. Your motion is that that evidence should be postponed.

Mr. Aldrich: Exactly.

Mr. Mayer: It has nothing to do with the matter now on hearing. The question now on hearing is whether evidence of that type—

Judge Baker: It has got a good deal to do with it? There has been a great deal of delay, may be mutual, by virtue of making contentions before the Master with respect to the legal proposition and the legal rights that should be postponed until the facts and all of the facts upon which the question may be finally decided are brought out and found by the Master.

Mr. Mayer: Our position is that the Master, whether he thinks evidence is material or not, has go to receive it so that the District Court can determine—

Judge Baker: Yes.

Mr. Mayer: Whether it is or is not proper.

Judge Baker: Yes.

Mr. Mayer: And the District Court must do the same thing.

Judge Baker: Then, why are you trying to obstruct the inquiry into the profits of the Canadian and Australian

1823 companies?

Mr. Mayer: We are not trying to obstruct that. We want to get into this record all of the facts so that however the Master decides, however Judge Carpenter decides, we can get the opinion of this Court based upon the facts.

The present inquiry is this: They wanted us to account for Canada and for Australia. They are not here now asking you to make us do that. There is no such application here. The application here is that you should instruct Judge Carpenter to direct the Master not to take evidence.

Mr. Lane: That is the only question.

Mr. Mayer: The territorial use, that is the only thing pending before you. That is the prayer of the petition.

We are not asking you to help up keep things out and they are not asking you on this hearing to help them make us put in that proof.

The only petition, the only prayer of the petition, the only thing before you is, they are complaining that Judge Carpenter ruled that all this evidence must be in, that it must all be received, that this evidence is material and must be in the record.

1824 In other words, Judge Carpenter said that, in his opinion, and if I continue the reading of the return, and his opinion which is filed—and by the way, I want to say in passing that there are two copies of Judge Carpenter's opinion, one that they filed and one that Judge Carpenter filed. Theirs is inaccurate and imperfect in many vital particulars.

Mr. Aldrich: You don't deny that it is the official report, as Judge Carpenter pronounced it?

Mr. Mayer: I do.

Mr. Aldrich: Judge Carpenter edited it afterwards.

Mr. Mayer: I do.

Judge Baker: Then the thing as edited is what was said.

Mr. Mayer: I assume that.

Mr. Aldrich: After this controversy arose. I have got the original report.

Mr. Mayer: When this question came up, we take the position before the Master, and as I understand your Honor, Judge Baker and Judge Evans, say we are right in it, that the Master should receive all the evidence on this territorial use. When did we first go into a territory, and when did they first go into a territory? Were we known in that terri-

1825 tory? Were they known in that territory?

Judge Baker: Well, I don't know if when you went in is material.

Mr. Mayer: If we went in it is immaterial. If we went in before he did and the evidence shows that we went in in good faith, and not to forestall, then it is material.

The reason why we are going into that matter at the proper time is because Mr. Aldrich stipulated on May 21, 1919, saying before the Master—

Judge Baker: 1919?

Mr. Mayer: 1919. We have not been blocking this. We

have been ready every time the matter came up. They are the ones that are delaying us. This is what he said then:

"If you, the Master, have in your mind that at any time in this case upon the merits this evidence should be received. I am not objecting to its reception now except by broad objection to its materiality and incompetency, for any purpose whatever."

I read from page 19 of Judge Carpenter's return to the mandamus petition.

So that what we are asking, your Honors to do is to
1826 expedite it. You will expedite it if you do nothing.

The only thing that you may do, if anything, would be to grant their mandamus petition, and that is that you should tell Judge Carpenter that the order which he entered is erroneous. The order which he entered and from which they appealed was that the Master should receive this evidence. Judge Carpenter regards it as competent. Judge Carpenter regards the law as permitting us to show any exemption of the profits for which we have accounted, on such sales as took place in non-competitive territory and where we were not in there to forestall.

Why, your Honors know that even in a patent litigation where the defendant wilfully and deliberately infringes upon the plaintiff's patent and where there is a statute allowing not only profits but also damages, in such a case the defendant may prove how much of his profits came from the infringement of the patent and how much from other matters. I don't need to cite any cases on that to this Court.

Now, all the cases, and I think there are more than a page of them referred to in our brief, support the doctrine that

even if the District Court considers the fact in question
1827 incompetent, it should be received so that this Court can consider it, if deemed competent by it. In one of the cases that I refer to, where there was an appeal from an order, directing a witness to answer, where he did not do it, producing the books, the Court said it was the duty of the Master to receive the evidence so that it may here.

Now, I hope I have made that clear; that we are not asking the assistance of this Court. We are asking this Court to keep its hands off, so that all this evidence may be received, so that the party that appealed, when an appeal comes to this Court again, from a recovery, if there is any in favor of the plaintiff, the Larson Company, this Court can then decide the question as to whether this defendant, the Wrigley Com-

pany, if they have made profits, and again if its allocation is found to be wrong, whether or not they should pay profits on all those sales, so that, as your Honor, Judge Baker, said this morning, the Master's report will show what our sales were in competitive territory and what our sales were in non-competitive territory, and, manifestly in order to show that, in order to show what territory was competitive and what was non-competitive, we must have evidence who entered a particular territory first, whether it is the United States
1828 or China, and in addition to that—

Judge Baker: Of course, in that connection, the Master should receive evidence and make his findings of fact as to what effect, if any, the action of Wrigley against Larson, beginning in 1911, had, preventing him from reaching Australia, and so forth.

Mr. Mayer: If any such showing can be made, it ought to be in the record, if it is material and competent. If it is immaterial and incompetent, the Master will have to receive it and report it to the District Court, so that if the District Court rules differently, it can come to this Court.

I think it was the Dowagiac case, one of those cases, that was reversed simply because the record was not full.

I want to say on that subject, for a minute, that if as a matter of fact Judge Carpenter had entered a decree interpretable as they interpret it, namely, that we must account for all profits on all sales everywhere and that we may not diminish those profits by showing what part of the sales took place in non-competitive territory, we say in the first place it would have gone beyond the issues in the case and,
1829 in the second place, the decree would have been erroneous and would have to be reversed and no such interpretation ought or will be placed upon a decree which is susceptible of a broad interpretation.

In our brief we refer to cases—I shall not take the time to point them out now—where the general language was used in the decree finding the defendant guilty and directing it to account for all its profits made from the sale of the stoves, infringing stoves. It was a case in which the defendant sought to show how much of the profits came from the infringement and how much from other causes and the objection was raised that it could not be done and the Supreme Court said that if that decree were to receive a literal interpretation it would be too broad and would be erroneous, inasmuch as

when a defendant is compelled to account for all profits it necessarily means all profits accruing from its wrongdoing and that the defendant may show what part of it was from the wrong and what part of it was rightful.

Now, I have been wanting for some time to draw the Court's attention to your Honor's decision, to the decision of
1830 this Court in the Hanover case. I am not going to read it.

In that case, two cases went to the Supreme Court of the United States, one decided by this Court and one by the Fifth Circuit Court of Appeals.

In this Court the defendant was an innocent infringer. In the case in the Fifth Circuit Court of Appeals he was a wilful, deliberate infringer. The question arises as to what the rights were of the plaintiff in this case.

This Court, I think Judges Sanborn and Anderson were sitting with your Honor, Judge Baker, decided that although that was a case of a trade-mark, a technical trade-mark, and of course you can see that in a case of a technical trade-mark it is a pretty hard thing to show what it was that influenced the sale, with the trade-mark impressed upon the article itself—

This Court said that the cause of such an action is the injury done or threatened to complainant's trade, in which he has used the marks in question to designate the origin or ownership of his goods and that the appropriate relief is to enjoin the defendant from using the trade-mark to divert trade that otherwise would have gone or would go to the complainant.

1831 The test always is, especially in unfair competition, it is a sine qua non that the defendant is trying to filch the plaintiff's trade and that he is trying to palm off his goods for the plaintiff's, that he is selling his as the plaintiff's. Manifestly, if the Wrigley Company were selling in China and if in China Larson's goods were unknown, if his advertisements had never reached there, if he had no agency, no plant, there, nobody there that ever chewed his gum, the parties over there that were chewing Wrigley's gum were not filching any trade from Larson. Your Honors will, of course, have in mind that if Larson wanted to go over there, into China, there may be a question whether or not he can enjoin Wrigley from further going on with business there.

But there are many cases where the courts have held that

injunctions will be granted because that which the defendant is doing is a wilful fraud and yet in the same case have held that the plaintiff is not entitled to profits. It does not follow that a plaintiff is entitled to defendant's profits even though the defendant is a conscious, wilful and deliberate trespasser.

I say in this case the Wrigley Company has not been found guilty of wilfully and deliberately trespassing. The
1832 most that this Court has found, notwithstanding the serious charges that were made and which are made in the briefs when this case was before this Court before, all that this Court found is, as I said this morning, in the Spearmint case, that he was guilty of imposing on the Court in that case, unclean hands, or whatever you want to call it. In the case at bar, in the Doublemint case, where it is a defendant, it is said the Doublemint, we used the Doublemint seven months after the Wintermint was first put on the market and, quoting, there is a clear inference that at that time we did know of the Wintermint label.

Suppose we did know of the Wintermint label, it does not follow that our object and purpose was to filch the trade of the Larson Company. Notwithstanding our knowledge, we still may have believed that we had the right to use that mark. Now, bear in mind that while it has been said, and we will answer the charge that Wrigley was an habitual infringer, not a word of evidence, not a word of evidence in this case that he was ever charged by any other manufacturer —bear in mind, also, that Wrigley thought that he was en-
titled to the Doublemint mark. Larson said that from
1833 July, from December, 1913, when he introduced his Wintermint mark, he never complained of our Doublemint mark, and the first conflict between those two was a year and a half afterwards. When we filed the bill, not the present counsel of Wrigley Company, the former counsel filed the bill saying that this Doublemint was being infringed by Wintermint, and then months after, after we had gone on and spent millions of dollars to advertise our Doublemint, he then filed his counter claim in which he complains for the first time.

Now, bear in mind that the warning letter of which you have heard so much, in which they warned us against using Doublemint because it infringed on Wintermint, was sent on May 29, 1914. Your Honors probably would be justified—

Mr. Aldrich: We have not—

Mr. Mayer: Pardon me just a moment.

Mr. Aldrich: We have not—

Mr. Mayer: Pardon me just a moment, if I may be pardoned. Your Honors have been led to believe that that warning letter makes us a wilful infringer. That warning letter is not set out in the transcript, was drawn to the Court's attention specifically, that is, the terms of it. And by the way, let me say in passing, to avoid any confusion, when
1834 you come to read these briefs, if you ever get that far, bear in mind, as I have already said, that Mr. Lane and I were called into this case after the decision of this Court. In making up the record for the present appeal, Mr. Lane and I labored under the impression, from a reading of the briefs and the printed transcript, that you have before you, that you had nothing before you except the printed transcript, and brought about the entry of a stipulation on the present appeal that all the proceedings before Judge Anderson could be used. We were not aware at that time that a similar stipulation had already been entered by Mr. Offield, who then represented the Wrigley Company, and Mr. Aldrich on the prior appeal. You therefore will find some expressions in our brief to the effect that such and such a matter is now before this Court for the first time. Those expressions are technically inaccurate as we find from a reply brief that was served on us a few days ago, and those sentences should read, that instead of being before this Court for the first time, that your Honor's attention is now being drawn to them for the first time.

That letter instead of being a letter warning us not to make the Doublemint gum because it interferes with the Wintermint, reads as follows:

"May 29, 1924."

1835 I am reading from page 571 of the stenographic proceedings before Judge Anderson, and not reading from the printed transcript because this letter is not in it. It is referred to merely as having been introduced as Exhibit 15, letter from Larson to Wrigley, May 29, 1914.

"Wm. Wrigley, Jr., Company,
Zeno Manufacturing Company,
Chicago.

Gentlemen:

We understand you are about to manufacture and wrap chewing gum for a certain concern under labels, bearing brand

or copy similar to our registered trade-mark. Registered March 26th, 1912, serial No. 58239."

It says "Registered March 26th, 1912." That is a year and a half before they first began to use Wintermint.

I will read the balance of the letter so that I may truthfully said I have read it in toto.

"similar to our registered trade-mark. Registered March 26th, 1912, serial No. 58239.

"We wish to warn you against same and attach herewith copy of labels.

Yours truly,
L. P. LARSON, JR., COMPANY,
By L. P. LARSON,
Pres."

1836 As a matter of judicial history, that serial number 58239, is shown by the full record to be a Peptomint label and this Court has since found that Larson stole the Peptomint lable from somebody else and has been found guilty of wilful fraud in using it. I refer to the case of Larson vs. Lamont Corliss Company, which is referred to in the brief.

Now, whether or not we are guilty of this piracy, of this fraud, everything that is charged against us—the brief says we are guilty of perjury, perjury because of a fire, while three witnesses testified one way and three testified another way, and as Judge Carpenter said in his opinion—I will read it and what I am going to read now I am reading from the actual opinion as edited and perhaps that may account for the fact that counsel filed a very different copy. I read verbatim.

"Now, I don't know, I cannot tell," said Judge Carpenter.

"From the reading of this mandate and opinion of the Court of Appeals, whether they intended to—"

I will have to read back one sentence to connect up, to begin where Mr. Aldrich left off.

1837 "If the direction of the Court in those cases, where the infringement is wilful and malicious is that the infringing party shall make an accounting of the profits as well as damages (reading) the profits are given to the complaining party in addition to the actual damages."

The opinion which they filed had Judge Carpenter say, not if they are allowed their punitive damages but had him make the unqualified statement that they are allowed as punitive damages.

I read here

"Now, I don't know, I cannot tell from reading this mandate and opinion of the Court of Appeals whether they intended to adopt this drastic rule of compensating the Larson Company (reading)—

"There is nothing in the opinion—although the opinion did say something about the case tried down East,—"

that is the Pulver case—

"but it did not say that the Wrigley Company came into this Court as a wilful, malicious, fraudulent wrongdoer
1838 and for that reason the Larson Company is entitled to an accounting of profits. The opinion might have said that if the record justified it. It did not."

The opinion as they filed it reads: "The opinion might have said that" and leaves out the words "if the record justified it."

Mr. Aldrich: Mr. Mayer, I want to ask you if you impute, if you mean that we made any changes in it.

Mr. Mayer: I am making no imputations. I am merely stating facts. I am making no imputation.

Mr. Aldrich: That is an official copy of the opinion.

Mr. Mayer: I am perfectly willing to tell the Court what happened except I am afraid you and I will get into a controversy. I want to avoid a controversy.

Now, I made the statement that there are many cases holding that an injunction alone is not sufficient. Straus against Notaseam—if your Honors care to take the memorandum brief in support of Judge Carpenter's opinion, which he refers to in his answer and on which he bases his opinion, the first case referred to is Straus against Notaseam.

That was an unfair competition case. The defendant was found guilty of an intentional wrong and a deliberate fraud because he refused to cease after warning.

1839 And by the way, in speaking of the innocence, let me say this: One of the things you will have to pass upon when the case gets before you ultimately, if it ever comes here a second time, will be the likelihood, after all the evidence is in, of a concern that had spent over seven million dollars advertising its wares before Wintermint was used, the name Wrigley being known all over the world, whether such a concern would be likely to use Doublemint, which is merely its Spearmint label with the colors reversed, for the purpose of palming off Doublemint for the unknown Wrigley Wintermint.

Judge Baker: Larson Wintermint.

Mr. Mayer: In the Straus case—Larson Wintermint. Thank you very much.

In the Straus case the Supreme Court affirmed a decree for injunction but reversed a decree for profits and held,

"That an infringer is not chargeable with profits as a matter of course."

And then the Court went on to say that they were not recoverable in that case because of evidence of the very type that we are seeking to introduce and which will be introduced if your Honors dismiss this petition for a mandamus writ,

because Judge Carpenter's ruling was that this evidence
1840 is proper and should be received.

The evidence on which the Supreme Court there reversed a decree for profits, although the defendant was a wilfull trespasser was because they were operating in different territories and because it was apparent that the buyers of the defendant's wares did not think that they were getting the plaintiff's wares.

"The evidence there showed that the defendant's goods—" I am quoting.

"—were sold mainly in different places, and by parties not likely to be mistaken for each other."

But the plaintiff has no claim on the profits, that is, defendant's profits, resulting from, one, purchases made because the defendants recommended the goods—because Wrigley recommended the goods; not entitled to profits from, two, purchases made on the strength of the name as distinguished from the infringing label. That is, purchases made on the strength of Doublemint as distinguished from Wintermint.

Not entitled to profits, three, where the purchases are made from knowledge of the specific article. Buyers who know

both Larson and Wrigley, have chewed both gums, don't
1841 want Larson's. Shall we give him the profit on that sale? Did we trespass on his rights at that time?

Not entitled to profits, four, on sales from preference for defendant's article, or, five, for any reason but the inducement of the infringing label, supposed to indicate plaintiff's wares.

"Taking all these considerations into account, coupled with the absence of evidence that any deceit or substitution was accomplished in fact, we find it impossible to believe that any considerable part of the petitioner's business was due to their goods being supposed to be the plaintiff's hose. The

petitioners properly were enjoined from further use of the mark in controversy, but so far as the decree charged them with profits it is reversed."

Other cases are referred to. One of them is a case in which Mr. Reed was in, Merriam Company against Saalfield, a decision by the Sixth Circuit Court of Appeals, in the case where the defendant was guilty of wilfull, deliberate piracy of plaintiff's books, Webster dictionary case. The Court said upon the question of whether one person's goods were palmed
1842 off as those of another,

"Upon the subject of profits: We think the controlling question must be whether a sale was the result of the misleading."

The Court then referred to a patent case where the patentee had a monopoly of the article itself, where the patentee need not sell if he does not want, and where any infringer selling is liable to profits for trespassing on the property of the plaintiff. In the case of unfair competition there is no trespass upon the property of the plaintiff except where the defendant trespasses upon the plaintiff's reputation, trade or good-will, and when he does not, he is not trespassing.

What we are seeking to show in this case is to point out where we are trespassing and where we were not. We have reported all of our sales all over the world and now we are trying to segregate those in which we were not trespassing. We are not questioning now in this hearing before the Master, nor in this argument before the Court, whether or not we ought to pay the profits on the infringing sales. Our position, of course, is that we are not liable for them but, so far as this present argument is concerned, it has got to be received, otherwise this Court will never have it before it and this Court can never pass upon that question.

1843 What opposing counsel is seeking to do is to keep out of the record this question that we are offering before the Master to show, where they sold and where we sold and what territory was competitive and what territory was not competitive and when we entered it and whether or not in entering it we were trying to forestall them.

In this case the Court drew this distinction between trademarks and unfair competition:

"Not so, regarding a trade-mark and the right to protection against unfair competition; these rights are only incidental to an existing business; they cannot be independently injured or suffer damages; they do not create any monopoly

itself; there can be no damage in connection with the violation of these rights, except as there is injury to the business and good-will; and this damage can be only through loss of sales which otherwise would have accrued to the injured business."

"It follows that if the purchaser, immediate and ultimate, knew that he was not buying the plaintiff's wares but
1844 something different from and claimed to be better than the plaintiff's wares, and thus deliberately made his choice,"

and such cases, said the Court, quoting,

"there is no room for any inference that complainant lost a sale as the result of defendant's misleading, and so no room for the inference that it lost any profits or that defendant received any profits as trustee for complainant."

That case was approvingly cited in the Hanover Milling Company case which affirmed the opinion of this Court.

Reason it out for a moment. An infringer is said to be liable on the basis of a trustee ex maleficeo. Well, did your Honor ever hear of a trustee ex maleficeo having to account for profits that he did not wrongfully make out of a trust estate? What was Wrigley the trustee for? Trustee of the profits that he made. Made on what? Made by reason of trespass on the property of Larson.

Now, where we show that he did not trespass on the property of Larson, where we are offering evidence of the kind that the Straus-Notaseam case was expressly predicated upon, to show what really did cause the sale, negativing any idea that our sales in Texas, in Chicago, or wherever it was, were sales made in competition with Larson, surely we must
1845 not account for those profits.

We are not saying that we would not account for the sales. That is an entirely different question, but this record ought to show, under every decision that I have ever heard of, whether of this Court or other Courts, of the Supreme Court, what the facts are, so that the Master in the first instance may say, you sold ten million dollars worth of goods all together but of that the claim is made that one hundred thousand dollars of sales in Texas antedated any sale there of Larson and in addition to that it is shown that Larson never intended to go to Texas and that he intended to confide his trade, if you please, to the Northeastern territory, or the Northwestern territory, and when those facts are in this record, I am not a bit concerned as to what the law is.

Now, let us take another case. That was the Sixth Circuit Court of Appeals. Let us go to the Third Circuit Court of Appeals. I refer to the case of Rowley vs. Rowley, one of the cases that they cite, one of the cases that they rely on.

In that case the defendant was a wilful trespasser. He was ordered to account for both damages and profits and on appeal the decree was affirmed. See how much stronger
1846 that case is than the one we have.

The Court of Appeals had at first decided by affirming that the defendant was guilty, was a wilful trespasser and that he ought to account for both damages and profits. Thereafter the Court of Appeals affirmed a decree allowing plaintiff one dollar, and did it solely on the ground that it did not appear that—I am quoting now—

"Anyone purchased artificial legs (the subject in dispute) from the respondent supposing them to be the goods of the complainant, or that any sales were lost to complainant by reason of the alleged unfair competition of respondent other than might appear in the original record."

So although the Court of Appeals had held that they were entitled to an accounting for profits and had ordered it and had affirmed the judgment of the Court below to that effect, nevertheless they held that only one dollar should be recoverable and solely on the ground that there was no interference shown with the trade or good-will or reputation. No sales lost.

Now, the Sixth Circuit and the Third Circuit we have seen. Let us go to the Second Circuit Court of Appeals, where we did look with much confidence because of the vast
1847 amount of business that is in that Circuit. I refer to Rushmore vs. Badger Manufacturing Company.

The defendant there was found guilty of annoyingly imitating the complainant's lamps, motor lamps, even to the minutest detail, to the non-functional parts. An injunction and an accounting were ordered by the trial Court. The Court of Appeals affirmed the decree on the merits, finding it was a case of unfair competition, that what the defendant was doing was done wrongfully and he was a trespasser and enjoined him and they affirmed the injunction but reversed as to the accounting, saying,

"The majority of the defendant's lamps were sold on their merits, and on the established reputation of the defendants without any reference to the complainant's lamps."

How could they have said that if they had not heard the evidence?

Also the following:

"To award the entire profits made on the sales of defendant's lamps without proof of actual fraud on its part would be unequitable. It seems to us unfair that the complainant should recover profits on the sale of lamps by the de-
1848 fendant to persons who never heard of Rushmore, and were well aware that the lamps they bought were made by the defendant, and who, bought them because they were so made. A decree for profits and damages does not necessarily follow a decree for an injunction. (Citing authorities.) We think the accounting should be limited to sales where it is shown by direct or presumptive evidence that the complainant would have sold the lamps but for the sale by the defendant."

Now, if your Honors please, I want you to bear in mind this, also: Counsel referred to the Ninth Wallace this morning. When you come to read that case you will find that the Supreme Court of the United States did not say that the infringer must account for all profits. What they said, and the balance of the sentence was swallowed, or not repeated, "must account for all profits due to the infringement."

In a case that will interest your Honor, Judge Baker, doubtless, Hiram Walker & Sons vs. Grubman, because your Honor had a companion case before him, Judge Hand there
1849 held, in an unfair competition case where the defendants were found guilty of fraudulently palming off their whiskey for plaintiff's, that defendants should be permitted on an accounting of profits, to prove the honest use of any of the whiskey so sold by them.

Now, on this question of profits, where a plaintiff shows the profits, he need not segregate those that are caused by the infringement from those that were not, but the courts all hold that the defendant may introduce that proof, that such proof is of vital importance. When I use the words "vital importance" I am merely quoting a decision in this District, a case cited by this Court. I want to refer to it. Judge Baker, Judge Seaman and Judge Mack sat in it.

That is the case of the Western Glass Company in the 226th Federal, where the Court reviewed the Westinghouse case, which laid down the rule of proof as I have just now stated it, with respect to the burden of proving profits in patent in-

fringement cases, and while referring to that decision this Court said: I am quoting from this Court:

"As clearly stated in the opinion, it remains open to
1850 the defendant to disprove the plaintiff's case, or to offer evidence in mitigation, or both, so that the defendant is in no sense foreclosed from the benefit of any evidence which may tend to measure and prove the share of profits attributable to other means in addition to those of the patent."

In the 179th U. S., the Elgin Watch Company case, the Supreme Court said that if a plaintiff has the absolute right to the use of a particular word or words, as a trade-mark, which is stronger than an unfair competition case, then, if an infringement is shown, the wrongful or fraudulent intent is presumed and although allowed to be rebutted in exemption of damages, the further right of property will nevertheless be restrained, making the distinction that I have been arguing for that an unlawful wrongdoing may be restrained but it does not necessarily follow that all his profits shall be taken.

As Judge Carpenter says in his opinion which is attached to his return,

"I am very much of the opinion that in the absence of a statute that unfair competition means just exactly what the
words imply. If I am not in competition with a man I
1851 cannot treat him unfairly as a competitor."

Then he cited that case where a defendant, knowing that the plaintiff was operating locally and having no foreign business, should start a market in new territory for similar goods under plaintiff's label and never come into competition there with plaintiff and where, long afterwards, a bill is filed against the defendant, and then Judge Carpenter said:

"Is it conceivable that on the doctrine of unfair competition you can recover all of the profits that he made on that article?

"Under the ruling in the Flour case and the Shoe case, I think it is important for the defense to be able to show that Larson was only in a certain field, and that they, Wrigley, were in a separate field and very much wider and broader field, and therefore did not come in competition at all."

Now, I have threatened a number of times to say a little something more about the Hanover Star Milling Company
case. I read one paragraph from it already, to show
1852 that the cause of action is the injury threatened to the complainant's trade and the appropriate relief is to enjoin the defendant from using the marks to divert trade that otherwise would have gone or would go to the complainant.

"It is not the trade-mark, but the trade, the business reputation, the good-will, that is injured; and the property or right in the trade is protected from injury by preventing a fraud-doer from stealing the complainant's trade by means of using the complainant's commercial signature. From these considerations of the nature of trade-marks, and the basis and scope of trade-mark suits, it would follow that complainant in this case has no property in the mark 'Tea-Rose' like property in its mill and wheat and flour; has no monopoly of the use of the mark, like the monopoly of a patent or a copyright; has no right at all to the mark in gross, but a
right only to the extent that the mark is attendant to its
1853 trade; has no basis of complaint except for injury to its
business. And in unfair competition cases, of course there must be actual competition before there can be any unfair competition. And since a trade-mark suit is an unfair competition suit in nature and principle, complainant in this suit has no standing because there is no competition."

And then the following words were used by Judge Baker and were quoted by the Supreme Court in affirming this Court and were adopted by it:

"Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by the use of his mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

If such a thing, your Honors, is true, as it is of a
1854 trade-mark, how much more so is it of unfair competition which is predicated solely upon the defendant selling the plaintiff's goods, that is to say, selling his goods as and for the plaintiff's. Unfair competition means misquoting by whatever device so that the person getting the defendant's goods is liable to think he is getting the plaintiff's goods. Subtract that element, eliminate it, and as this Court has held from the time you decided the Borden Milk case in the 201 Fed., where the opinion was written by Judge Carpenter and concurred in by the other members of the Court, there is no such thing as a cause of action, no such thing as a right to recovery, in an unfair competition case unless the plaintiff's business, his trade, his reputation or his good-will has actually been trespassed upon. And the defendant can

never be a trespasser unless and except he is palming off his goods as and for the plaintiff's. It is the sine qua non.

This Court, going on now further from the Hanover case, then distinguished various cases because of the presence of evidence of the very type that we are discussing.

Thus, this Court undertook to distinguish Kidd vs.
1855 Johnson, 100 U. S. That was a case where the Supreme Court affirmed an injunction in favor of plaintiff who had a distillery in Cincinnati against a defendant who was using the same mark in New Orleans, different territory. The injunction was affirmed and in talking of that case this Court said:

"And nothing in the reported case indicates that the genuine Pike's Magnolia whisky was not sold and well known in the New Orleans market."

Now, if we had been trying that case we would have offered evidence on that subject and Mr. Aldrihe would have opposed it on the ground that it made no difference, and if he opposes it in an unfair competition case, he surely would have even more vigorously attempted to oppose it in a trade-mark case, but the Court distinguished that case because of the very type of evidence we want to introduce here, just as in the Straus case the reversal of the decree for profits was based upon evidence of this very type, the territorial use, where used, and so forth.

This Court further added, that,
1856 "If the junior user (I am quoting) should attempt to forestall the elder trader by hastening into markets the elder was arranging to occupy, it might be that equity would have no difficulty in recognizing an inchoate right in the elder to precedent and dominance."

In other words, it might be that an injunction would issue. Surely, an injunction would suffice. No intimation or suggestion that the Court would go further and make the defendant who sold gum in China to persons who want the Wrigley gum, who would not have taken the other gum, never had it, make him account for profits.

Take a case and it is actually coming into this case, the record of this case will show that the United States government wanted a lot of gum for its men in the trenches, who paid nothing, took bids from us and from Larson—that is going to be in this record, as to whether or not those sales should be included.

I read here from what this Court said:

"If complainant has trade rights irrespective of the
1857 existence of its trade, whence do they come? Monopolies are in derogation of common right; they are special privileges."

Now, I want to read a few sentences from the decision of the Supreme Court in that case, showing the great importance of the presence in the record of evidence showing where we sold, where they sold, where we advertised, where they advertised.

Before doing that, lest I forget, I have already told you that in the case, in this Hanover case that went up from this Circuit, they don't say an innocent user but that in the case decided the other way by the Fifth Circuit Court of Appeals the defendant was a wilful trespasser and the Court in its opinion points out that the territory was the common territory in which this defendant entered, that he could not buy the goods of the plaintiff, that they would not sell to him, that he got them surreptitiously, put them in the same kind of bags and did threaten to impose upon the public his wares for the plaintiff's wares and in that case this is what the Supreme Court of the United States held:

"Complainant is thus shown to be entitled to an in-
1858 junction against defendant, irrespective of his claim to affirmative trade-mark rights in that territory."

Limited the injunction to that territory, and in that connection, while I am speaking of that, let me draw the Courts' attention to a decision, of, I think it was, the Fourth Circuit Court of Appeals, where the owner of a mark, "The Velvet Kind" for ice cream sold in Washington sued a man who was passing through Washington, saw the words, liked them, went to Baltimore, used those words for ice cream, copied the pictures on the containers, and appropriated the complainant's color scheme for wagons and other paraphernalia used in connection with the business. Held, that inasmuch as plaintiff's trade had not reached Baltimore, as he was not known there, he could not enjoin the defendant. The mere fact that he was using that mark is immaterial.

To illustrate: I see a mark in Chicago. I like it. I think it is a good mark. I go to California and use the same mark. Does it follow that I have gone to California for the purpose of forestalling the man or to cheat him?

I admit when I come into Court that I saw the mark, and
I liked it and I used it. Now, whether or not you would
1859 enjoin me is one question. Whether or not I would have to account for profits out there is another question.

In the Hanover Milling Company case the Court points out such things as this.

"But there is nothing to show the extent of such use or the markets reached by it, except that in the year 1872 Allen & Wheeler sold three lots of twenty-five barrels each to a firm in Cincinnati, Ohio, and one lot of one hundred barrels to a firm in Pittsburgh, Pennsylvania; that in the early '70's another firm in Pittsburgh was a customer for this brand; and that in the latter '70's a firm in Boston, Massachusetts, was a customer for the same brand. As to the Allen & Wheeler Company, there are affidavits stating in general terms that since its incorporation in 1904, and continuously down to the present time, the company has used the brand "Tea Rose" for flour; but there is a remarkable absence of particular statements as to time, place or circumstances; in short, no showing whatever as to the extent of the use or the markets reached."

I might go on and read a great deal more from that decision, from which you would see that it was absolutely
1860 essential in the decision of an unfair competition case to find out the very things that we are undertaking to prove and which the other side are trying to keep out of this record.

Your Honor, Judge Baker, referred to the Tilden, Proctor case this morning. That case was approvingly affirmed in the Dowagiac case, one of the cases to which we refer in our brief, and in it, let me say, the Court quotes approvingly, that a Court of Chancery is not going to punish—as your Honor, Judge Baker, said when you come to reason this thing out, what right has a plaintiff in a chancery suit? If he sues at law, what is his measure of damages? He must show his actual damages.

Now, why will a Court of Chancery give a plaintiff, in an unfair competition case, where there is no statute, greater damage than a court of law would grant? Why would a Court of Chancery exclude evidence tending to exempt, to segragate profits from innocent sales when a Court of Law would permit it, and as was said in the Tilden case, it would be inequitable to punish the wrong-doer by giving the injured party more than what was just or what was compensatory, and in that case—

Judge Baker: I was referring to a different part in
1861 the Tilden case, wherein it say that it is not strictly accurate to speak of profits as distinguished from damages, that the jurisdiction to go into the money matter at all

is not a part of the original chancery jurisdiction, but the Chancellor is supposed to have taken the case on a ground that is purely in equity jurisdiction and settle it in one lawsuit, settle all the legal rights in one lawsuit. The injunction is purely prospective and the action for damages is retrospective—one of equitable nature and the other is all law. Equity having gained jurisdiction, will consider the other. What the party is entitled to as damages is the profits. As I recall that Tilden case, that is the only way for determining what the plaintiff's damages have been.

Mr. Mayer: That would be undoubtedly true in a patent case.

Judge Baker: Of course, in a patent case or any other case. You are correct in saying, necessarily correct in saying that the profits that the man makes must be the profits that are attributable to trespass.

Mr. Mayer: Now, in that same case, your Honor, the Supreme Court expressed the fact—

1862 Judge Baker: I am interrupting for the purpose of inquiring whether your time has not elapsed.

Mr. Mayer: Well, I really have not been watching that because I know the liberality of this Court, and the unwillingness of this Court to stop anybody until the time comes when the Court thinks it has been sufficiently enlightened, but if my time is up and the Court wants me to discontinue, why, of course, I stand ready to do it. There are some few matters that I want to call your attention to.

Mr. Aldrich: We wish to call the Courts' attention to some matters so we want a little of our share of the time.

Mr. Mayer: If I could have a few minutes I will try to get through.

Judge Baker: Very well.

Mr. Mayer: Before I leave that Tilden case I want to refresh your recollection in case you have forgotten it, that in that the Court squarely held and commented on the fact that there was no evidence that the plaintiff lost any sales or had the facilities or means to have supplied the demand.

Now, there is another recent case that I just want to draw attention to for a moment, the Hamilton Brown Shoe

1863 Company case, which is a well known case. I want to say, if your Honor please, that in this case, when you read that, when you take the history of that case, you will find the following:

The trial Judge dismissed the bill. The Court of Appeals

reverses it and remands for an accounting of profits due to the wrongdoing and the infringements. Refers to a Master. He reports three kinds of sales.

Item one, where the defendant sold shoes, using the plaintiff's trade-mark. Plaintiff's mark was The "American Girl". The defendant's mark was the "American Lady".

The second type of sales made by the defendant was "The American Lady. Hamilton Brown Shoe Company" with nothing to indicate whether Hamilton Brown Shoe Company was an agent, merchant, jobber or manufacturer. Held liable for those.

Next, third, "The American Lady. Hamilton Brown Shoe Company. Makers". Held not liable.

The case went up to the Court of Appeals again. The Master's report was affirmed. The principle of the decision being that the defendant was not absolutely liable for all
1864 profits resulting from its use of the infringing mark and, remember, please, that that was a case of trade-mark and the defendant had wilfully entered the plaintiff's territory and wilfully appropriated his trade. The Court said he was not liable for profits on sales made where there was no deception, even though the defendant was found guilty of a fraudulent and wilful attempt to destroy plaintiff's already established business.

That Court, therefore, allowed nothing on the sales where the purchasers could not have been deceived, although the shoes bore the plaintiff's mark.

It is significant that Judge Hook in that case dissented on the ground that the plaintiff ought not even to be allowed the other profits where the mark was used without any explanation, and where the mark was used with the connecting words, "Hamilton Brown Shoe Company" without indicating the agency of the maker or what, Judge Hook being of the opinion that unless it appeared that plaintiff would have earned those profits he could not recover, that it must appear that the competition even as to that was unfair, that the Court should inquire into the conditions of the trade and the relations of the party to the different markets so the real effect of the the sentence use might appear. And he illustrated his
1865 market by supposing a set of facts almost identical with those before your Honors now, and pointed out, taking Nebraska, I think, and Illinois as illustrations, one first doing business in one state and one in another and he pointed out that while in such circumstances an injunction might issue, it

could not be expected that the plaintiff would recover all of defendant's profits, that that is the rule of recovery that would apply in a patent case but not in a case of unfair competition.

When the case reached the Supreme Court they held it was a trade-mark case; not an unfair competition case, and two Judges, the Chief Justice and Mr. Justice VanDevanter held that none of the profits could be recovered without a showing of deception. Therefore, in that case all the Judges who spoke on the question, Judge Hook, the Chief Justice, and Mr. Justice VanDevanter, agreed. The Majority of the Supreme Court allowed the profits on Class one and two solely because they held it was a trade-mark case. The majority of the Court, as well as the minority, all agreed as did the Court of Appeals, that no allowance should be made for the profits that the wilful, deliberate, fraudulent defendant made on sales of shoes bearing the plaintiff's trade-mark where it ap-
1866 peared that the defendant was the manufacturer, demonstrating beyond cavil that even in the use of a trade-mark, where the defendant can show that he did not filch all the plaintiff's trade by reason of it there shall be no liability.

Now, bear in mind also that in that case the defendant did not do what we are doing. He did not there try to separate the profits made in Class one and Class two, out of sales that were innocent, that went to purchasers who knew what they were getting, from sales that went to persons who didn't know anything about it.

The other side undertook to read that case as one supporting their proposition, but in that case the plaintiff did not seek to separate the profits and under the Dowagiac case and the Westinghouse case, the 225, the burden was not on the plaintiff to separate but the defendant has the right to separate, as this Court held in the Western Glass Company case, based on the authority of the Dowagiac case.

Now, I regret exceedingly that because of the interruptions, and it is needless to say that I am not saying that in any fault finding way, that I can't finish reading the return of Judge Carpenter and his opinion, from which it will appear
1867 absolutely, I think, conclusively, that after a full consideration of all of these questions there is nothing in the opinion of this Court which decides and therefore makes the law of this case, that the Wrigley Company must account and pay for profits, not account for damages, must account for all profits and must itself assume the burden of showing

that some of its sales were made in territory that was virgin field, where Larson was unknown, had no trade, no business, no reputation, no means, no plant, no facility, no credit, no intention to go into those places.

Now, when it comes to a question of intention it is pretty hard to prove whether Larson did or did not intend to go to China. You could ask him and the chances are that he will swear he did. But the best way to prove intention is by the facts. How long had he been in business? How extensive was his business? How extensive was the advertising? Where was he selling? Where were his salesmen? And from all of those facts this Court will have no difficulty in determining.

There is one case that was emphasized on the question of appeal. I don't want to see this Court knowingly fall into error because I am so confident that this order is not
1868 appealable, the order appealed from, that is, Judge Carpenter's order directing the witness to answer.

They refer to the 14th Howard. In that case the order appealed from was a final order. In the 153 U. S. the Supreme Court squarely differentiated that case that held that the order there was appealable from, and further holding—

Judge Baker: I don't think there is any need for spending any time on authorities on this question of appeal. That belongs by virtue of authority to the Judge of the District Court. It might go without the petitioner's adversay being in court. The appeal, therefore, may be taken, transferred into a motion, to bring you as well as the District Judge into court.

Mr. Mayer: For that reason I said to the Court this morning that I did not intend to spend much time on that but I felt it was a duty that I owed this Court, as a member of this Court, to draw attention to its non-appealability.

If this Court grants the mandamus, which, of course, is never used for the purpose of directing a lower Court what to do but is, as your Honor just said, used for the purpose of obtaining obedience to your mandates and to your deci-
1869 sions. For you to tell Judge Carpenter what to do in this case will simply mean in my judgment that you are deciding for the first time now something that you have not decided heretofore. And by undertaking to decide these questions that have been discussed now for the first time you will have deprived us of an opportunity of having the Master hear the evidence, the District Court hear the evidence, and then this Court get the evidence, because this Court, and reading

its opinion is all that is necessary in my judgment, to justify my confident statement beyond possibility of dispute that this Court did not pass upon the question of what kind of an accounting or the extent of the account be had. It was not a matter that was adjudicated before. We never heard of that question before. Judge Anderson did not get up to that point.

We are entitled to have the facts in the record so that we can have an adjudication on that and then when we have had the case heard below the Court will pass on it.

That recalls a case I had in mind this morning. I think it is the 125th U. S., or the 175 U. S., as I recall it, where some question of rates was involved, and an injunction issued
1870 and the Supreme Court of the United States held, there is not enough evidence in this case for us to determine what the rates should be and dismissed the bill. The parties below did not have an opportunity to be heard on that question. And this is an appellate tribunal. And so it refused to pass on it.

The rule of Judge Carpenter that I submit is right, because the subject is within his jurisdiction. The kind of an accounting, the extent of accounting, are all matters that have never been presented to any Court and should be presented to him. He has entered a decree directing us to account for profits in the infringing dress. We filed our account. We are now seeking to introduce proof that the Master has said is competent, that he has held competent, which the Courts have all held competent without exception for the purpose of segregating the profits on innocent sales from those in competitive territory.

It is the duty of the Master in the first instance to determine what testimony should be received and even if he should think that it is immaterial he has got to receive it. And the same rule applies to the District Court. Otherwise, that is excluded. If it comes up on a second appeal, if there is
1871 a decree against us and we appeal or if there is a decree against them and they appeal, how can we ever argue in this Court these questions that we should, the ground-work upon which the Supreme Court decided that express question in the Hamilton Brown Shoe Company case and all the rest of the cases that are in the brief?

How could this Court have decided the Hanover case, as it did, how could it have talked about the trade, that it is the trade not the mark that creates the right and pointed out from

the testimony the different territories in which the various parties had advertised their goods and were known and unknown unless the evidence had been received?

And so, I say, if your Honors please, that this matter is of a serious nature to us, because unless we are permitted to do that we never will have in the record the basis for an adjudication against us which will be predicated upon justice.

Your mandate must receive a reasonable construction. Your opinion must be looked to. I challenge counsel to read a word in the opinion or the mandate anywhere that the Wrigley Company must pay over every dollar that it earned from
1872 its sales whenever they were made and that company has no right to show in exemption of those profits circumstances of the type that we have been discussing.

I thank your Honors for your attention. I feel prefectly confident that if it becomes necessary for this Court in the mature consideration of this case after the close of the argument to read Judge Carpenter's return, the brief memorandum of authorities that was filed in support of it and the authorities in our brief in reply to theirs, that you will find there something that will justify our hope that the appeal will be dismissed and the writ of mandamus denied.

I thank your Honors.

1873 ARGUMENT BY MR. REED.

If it please the Court, I am going to be very brief in this behalf. I am not going to attempt to follow counsel through all his ramifications. I am going to occupy your time but a few moments and that is on general considerations.

First, what did this Court decide in the first case? If this Court will take the pains—I do not see how it can be settled by oral argument except to call attention to the places where you can find the information.

Take the testimony. Look at the original bill of complaint. Take the original transcript, the consolidated appeals. In the second case No. 488, the pleading beginning on, the bill beginning on 37 and running over to 40 and running over to 45 and then proceed to the answer and counter claim. Begin a litle farther on and run over to page 62 and 3 and you will find that the issues were there clearly made up and there clearly defined.

I want to correct one error of statement that I made to

the Court this morning and that is that there was not
1874 any appeal by the complainant in that second case, the original case. There was. The reason that I fell into that error was that nothing is said about it in the mandate. It simply says that the portion of the decree which is named in the Spearmint—Doublemint suit—Wintermint suit, which dismissed the counter claim, shall be reversed. It don't say anything about the rest. I don't think it makes much difference. If it does make much difference. If it does make any difference it makes it stronger against the Wrigley Company.

Now, if the Court will go a little further, I know it will read this opinion, and read the opinion in those two cases. That will verify our statement that the question of the accounting for profits alone was discussed in that second case, as shown by the briefs.

If you will then turn to the mandate, which they find on page 2 of the appeal record, which we have been discussing, page 2 of the appeal record, I think you will find it in the other two, but there is more in this, so I will just refer to one record and you will find the language, what was said in the appeal and objections entering an injunction and accounting, both of them without any limitation, mod-
1875 ification or qualification whatever.

Then if the Court will turn further to page 3 of the appeal record you will find the decree entered by Judge Carpenter in this case after that mandate came down. You will find that there wasn't any limitation, territorially or otherwise, to the injunction. It enjoined the dress, the infringing dress that was complained of.

A reference to the pleadings in the case will show that not only was an accounting to be had of profits that were diverted by wrongful acts of the Wrigley Company from the Larson Company but of all profits that were received by the Wrigley Company and an assessment of damages and the usual prayer for relief, each one of which is sufficient to raise the issue as to the nature of the accounting and does raise it, because the relief prayed for was denied by the replication filed and therefore a clean-cut issue was made when those questions were submitted.

Then if the Court will turn either to the return of the respondent here of the mandamus suit or to page 12 of the record of the appeal suit you will find Judge Carpenter's opinion.

Now, it is recited in this decree—this decree entered by
1876 Judge Carpenter after the mandate came down recited

"Now, therefore, in conformity with said mandate—"

After the mandate had been referred to in general terms and described

"It is ordered and decreed, —"

First comes the injunction and then

"And this Court doth further order and decree that the cause be referred to Charles B. Morrison, one of the Masters of this Court, with all the usual powers of a Master in such accounting, to take an accounting of all the gains and profits of Wm. Wrigley, Jr., Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined, from its first sale on July 28, 1914, to the date of the entry of this decree, and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until compliance therewith."

Now, it seems to me that there is the mandate of
1877 this Court construed by counsel, construed by the lower Court, entered and the proceedings started.

And the accounting was filed for the entire gains and profits by the Wrigley Company for the United States and for Canada, and Australia, down to the time they organized those two auxiliary corporations.

Then came a motion to extend that report. There is the language: "Gains and profits that had come to it through these new corporations" and then comes this evidence.

And then the question was raised by counsel for defendant as to whether the accounting meant an accounting of all the profits or whether defendant could show, not simply deducting the overhead and legitimate deductions allowed by this Court, but could show, practically put it upon the plaintiffs to show that they were damaged in the strict sense, technical sense, not profits and damages, or damages as profits, but damages showing an injury to plaintiff's credit, and then this question arose, and it will be seen from the references which are made to the original record and the original pleadings and the original opinion and the man-
1878 date and the decree, that all these questions are adjudicated.

Now, this Court has squarely before it in that appeal by the Larson Company and also the appeal by the Wrigley Company in this Spearmint-Doublemint-Wintermint case,

both the rights of the complainant Wrigley and the rights of the counter claimant Larson and they adjudicated it and they had to adjudicate it, adjudicate the question of priority and title because that was incumbent upon the title. The title was dependent upon that, the priority of adoption. It did adjudicate that and it found priority in the Larson Company.

It also had this issue, square issue as to an accounting and what kind of an accounting. It did adjudicate that and it awarded it to Larson in the language which I have read from the mandate.

And the lower Court construed that as an accounting of gains and profits arising from the use of this dress.

Not only that, not only do these facts appear but from a perusal of the opinion it will appear that all the facts, that all facts necessary to charge the Wrigley Company as a deliberate, wilful, ex maleficeo trustee for profits, but said it in the opinion. So much for that.

1879 I say this further, I may add one thing, that it does appear from this opinion by Judge Carpenter, below, that while he had entered the decree so that, as is stated here in Court, it is satisfactory to both parties as embodying the mandate of this Court, he and the Master are now construing it contrary to the mandate of this Court and contrary to what this Court adjudicated it should be, frittering it away.

Now, this question is not the question that counsel urged, but it is a good deal broader and deeper one. It is perfectly apparent from the opinion of Judge Carpenter. Just a word from it.

"If that Court"—

That means this Court—

"—is of the opinion that irrespective of whether there is competition or not that the cross complainant is entitled to everything that the plaintiff made by the use of the infringing matter or wrapper, whether in Alaska, China, Australia, New Zeland or anywhere in the world, then the record should be in shape that they can pass upon it. I am very much of the opinion that in the absence of a statute that un-

1880 fair competition means just exactly what the words imply. If I am not in competition with a man I cannot treat him unfairly as a competitor."

But there is a great deal more to this doctrine of unfair

competition than that, and our Supreme Court has just set down in the News case, the International News against the Associated Press in the 248 U. S., where the injunction was awarded not because the defendant was palming off its goods as the goods of the plaintiff but because the defendant was taking the News collected by the plaintiff and publishing it in such a way as to make the people believe that it was its own news collected by itself and it especially quoted its definition, which is not of unfair competition but of passing off, as the English have it. You see the French have a general definition which means unfair competition and the English distinguish the particular class of case here by a definition which means passing off goods.

The case in the 198 U. S., where it says the essence of fraudulent competition or unfair competition is the sale of
one man's goods as another's and says that is not broad
1881 enough as they go on and award the injunction on the
Coats case.

Now, this Hanover case, the Rectanus case, this question of the necessity of trade, this attempted application of injunction decisions and of cases that went off on injunctions because there wasn't any existing trade, all those cases can be distinguished from the present one in a single word.

The Hanover case, the Notaseam Hosiery case, in the accounting, are cases wherein an appropriation was made and the infringement started, and in the latter case continued without any notice or knowledge whatever of the other man's right anywhere. Here, not only was there full knowledge on the part of the Wrigley Company at the time they took this Wintermint dress of its prior adoption and use by Larson, but the use began right here in Chicago and the conduct, the very conduct of the defendant that is sought to be put in evidence before the Master now tends very clearly to show an attempt to forestall which the Supreme Court after quoting Judge Baker's language in that "Tea Rose" or Hanover case expressly made an exception, and which another case
which was read by Mr. Mayer, an exception to the gen-
1882 eral rule that the mark must follow the trade in order
to have protection.

Now, I put it to your Honors as completely and as flatly as I can, whether it is not evidence of an attempt, and intent, to forestall when a large competitor, having brought suit, an unfounded, perjured suit, against a smaller competitor,

repeats the allegations, insists that there is a repetition of the infringement alleged in the first suit by a new package, repeats the same story, which it then knows, which it knew at the beginning is false; when it attempts to have an injunction although it knew at the time it filed this bill that it was imitating the counter claimant's dress, and then went to work and extended its trade into other territories which it is now trying to prove, before the counter claimant could get there or did get there and filed this bill and sought an injunction and an accounting of profits from counter claimant itself.

Now, isn't that showing of the record in this case sufficient to show that the defendant, that the Wrigley Company, was endeavoring to forestall the Larson Company in markets where it went? It seems to me there can be no escaping that conclusion.

If that is the case, then the decree of this Court, con-
1883 strued as we insist it should be, as an accounting for all profits, everywhere and anywhere, is perfectly justifiable and was an adjudication in this case and it is an adjudication in this case. It is punitive for the complainant, the Wrigley Company, the counter defendant, for its conduct and attempt to keep the cross defendant out of the market. To forestall, as used in the Supreme Court in the Hanover case, to my mind, does not mean forestall the market. Technically, under the old rule at common law—

Judge Baker: Forestall means to anticipate.

Mr. Reed: Forestall means to anticipate it, interfere, prevent it, obstruct it. If your Honor will refer to the dictionary you will find those are the primary meanings.

So that we insist that all these questions that we are raising have been adjudicated by this Court. This Court has the jurisdiction to consider them.

Judge Baker: There is nothing discussed in the Wrigley-Larson appeal here of the question in the "Tea Rose" case to forestall, running ahead of another to get into a market. There is a question of law. There is no express need of facts on that subject of forestalling.

Mr. Reed: No, sir; no need of facts. That is on the ques-
tion—but a finding of facts which would justify that
1884 in this, if it should come up, but my judgment is that the issues made by the pleadings, the things decided in the opinion, the things referred to in the mandate, fairly and

properly construed, taking all that was decided, I submit, and at issue in that case—I mean, that is what we claim, an adjudication of all these points, and the order for an accounting of profits did include all profits anywhere and everywhere for that period for the sale of goods in the infringing dress.

REPLY ARGUMENT BY MR. ALDRICH.

May I say just a word in explanation so that there may be no misunderstanding here, if the Court please?

Before discussing the case, I want to call attention to page 2 of my argument in which I had said about this question of whether we had sold gum in Australia or in Canada:

"I wish to be understood that I don't care whether we had or not. In fact, as I understand we had sold no gum in Australia and only a few sales in Canada, if any."

1885 Then on page 23 I said—

I have held, I had discussed here the question that the law of the case had been settled and our right to an accounting for all profits because not only of the unwarranted suit against us but also for the conduct in the course of the case which tended to pollute the administration of justice and then I said:

"You have to hold that the proposition that I am about to state is true or you have to rule against Mr. Mayer's contention, that we should not extend this investigation to Canadian and Australian countries, irrespective of the question of whether or not the Larson Company had any business in those localities or not. I have conceded, if the Court please—"

This is what I said:

"—that they did not have business in those localities. That is all right. Take the confession for what it is. There is no doubt about that."

Now, just one word more and I am done.

There are three cases, if the Court please, two of them

1886 are in our brief, there are three cases—

Mr. Mayer: Mr. Aldrich, may I interrupt you to ask you a question?

Mr. Aldrich: Yes, you may.

Mr. Mayer: You have been reading from some pages. Are you reading from any pages of any record that is on file in this case?

Mr. Aldrich: I am reading from my argument.

Mr. Mayer: Is that on file?

Mr. Aldrich: As it is taken by Miss Franklin on April 18th.

Mr. Mayer: Is that part of the record in this case?

Mr. Aldrich: I have a right to refer to it, yes.

Mr. Mayer: The reason I am asking is, Mr. Aldrich, is it fair to say that that is not my understanding from my copy of the argument?

Mr. Aldrich: You look at your copy and you will find that same thing on page 23. Miss Franklin has furnished me that. She is the official reporter.

Mr. Mayer: I find that your admission went no further than to say "The sales were little or none."

Judge Baker: Of course, if you have put properly into the record an admission of what they are endeavoring
1887 to prove, why that would stop their proof.

Mr. Aldrich: That is not what they are endeavoring to prove. You will find the record. I don't want to go into it now. It is time to adjourn. I don't want to take the time before adjournment. My time has been cut short by the prolongation of Mr. Mayer's argument. I don't want to take but a few minutes.

The question has arisen here of what I said. I stated we have no business. Now, when you come to inspect the record, as I trust your Honors will, you will find that they are not asking about our having business in Canada or Australia. My concession has covered that. I am ready to concede that.

They are going into Mr. Larson's business, to know where he banks, to know how much money he had, where he got it—

Mr. Mayer: Not at the present time, Mr. Aldrich.

Mr. Aldrich: Yes, you are.

Mr. Mayer: Pardon me.

Mr. Aldrich: Yes, you are.

Mr. Mayer: You are mistaken. I beg your pardon.

Mr. Aldrich: I don't want to be interrupted, Mr. Mayer.

Mr. Mayer: I don't know how I can reply to this dis-
1888 cussion—

Mr. Aldrich: The questions they have asked are put down in the record and I appeal to that to verify my statement.

It is a search into Mr. Larson's business in every nook and cranny. In three different cases that has been decided to be in derogation of a decree for profits. Two of them were in our brief. The 159 Fed., 292 and 293 is on my brief. The

case in the 168 Fed., decision by the Circuit Court of Appeals in the Second Circuit is not on my brief.

Mr. Mayer: What is the title of that case?

Mr. Aldrich: That is the Delong Hook and Eye Company against Francis Hook and Eye Company.

Judge Baker: Where do you find it on your brief?

Mr. Aldrich: I have got it on my brief.

Judge Baker: I say, where do you find it?

Mr. Aldrich: I have got it in the Appellate Court brief, if the Court please, under proposition three.

Judge Baker: In the reply brief?

Mr. Mayer: Which one?

Mr. Aldrich: Appellate Court brief.

Mr. Mayer: Which one of the three briefs?

1889 Judge Baker: You mean your reply brief?

Mr. Aldrich: No, I mean my original brief, under paragraph three.

Mr. Mayer: Which page? Which brief? The appeal brief or the—

Mr. Aldrich: I have said, Mr. Mayer, in the Appellate brief, at page 23. I have cited one of those cases, the Delong Hook and Eye Company vs. Francis Hook and Eye Company, 159 Fed., 292, 293. I have got my case in there, the case that I want there and the 168. Those two decisions bear directly on the question we have discussed here. It is held in those cases—I have commented on it in my text.

Judge Baker: It is in the brief. All right.

Mr. Aldrich: Yes, it is in the brief. I have commented on it in my text, in the text of our brief. We have commented on it in our text.

But in that case there were two kinds of hooks and eyes shown by exhibits 4 and 5 that had been discontinued by the plaintiff before the alleged infringements had taken place and the Court had held that the defendant should account for profits and it sought to show the fact of discontinuance of those brands and argued therefrom that there could be

1890 no substitution in trade or trespass upon the trade of the other parties if the complainant was not selling those two kinds of hooks and eyes. And the Master refused to accept the evidence.

The Court in 159 said he did right because that was in derogation of a decree for profits ordered by the Circuit Court of Appeals. And when that case again came to the Circuit

Court of Appeals, why they again affirmed that and used this language. It is only a word:

"The point mainly relied upon is that the Master refused to receive evidence to show that complainant had not continued to card and sell its hooks and eyes as shown in Exhibits 4 and 5 down to the period covered by defendant's infringement, it being contended that if such goods were withdrawn from the market defendant could not be liable for profits derived from substituting. It is not necessary to pass upon the merits of this contention. We do not intend to intimate that it has any merit. The Master properly excluded the testimony because the question has conclusively been dis-
1891 posed of by the decree. The point bears, not upon the amount of profit, but upon complainant's right to any decree at all for profits. That question was a part of the main case and should have been litigated upon that trial. The decree for profits which has been affirmed by this Court finally disposed of it."

Now, the same opinion is held although the decree in that case was for damages and there is a full discussion of the difference between damages and profits, a distinction which Mr. Mayer has asserted does not exist.

The case is also cited in our brief of the Sharpless vs. Lawrence Company and in that case it is held after they attempted to show profits after the Court of Appeals had only ordered damages, that that could not be shown because that was in derogation of the mandate of the Court.

I thank you.

Which was all of the proceedings had in the above entitled hearing.

1893 No. 2822

Filed Sept. 28, 1921.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In re Petition of L. P. Larson Jr. Company for a writ of Mandamus. } No. 2822

Motion to amend order heretofore entered herein so that Master in Chancery, C. B. Morrison and opposing counsel may know that this court has held that the defendant should file account as prayed.

CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Supporting the Motion.

Filed Sep 28 1921 Edward M. Holloway, Clerk.

1895 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In re Petition of L. P. Larson Jr. Company for a writ of Mandamus. } No. 2822

Motion to amend order heretofore entered herein so that Master in Chancery, C. B. Morrison and opposing counsel may know that this court has held that the defendant should file account as prayed.

May It Please the Court:

The undersigned, counsel for the L. P. Larson, Jr. Company, move the court upon the attached petition of the said company, with its exhibits and the affidavit of L. P. Larson, Jr. thereto, that the order heretofore entered in said cause in this court at the present term of this court, be amended so as to specifically adjudicate that an account of the profits of the Wm. Wrigley, Jr. Co., Limited, Canadian corporation, and of Wm. Wrigley, Jr. Company, Proprietary, Limited, Australian corporation, on Doublemint gum manufactured or sold by said companies in the infringing dress, be filed by the defend-

ant herein within a short day to be fixed by the master; and that chartered accountants selected by L. P. Larson, Jr. Co. be permitted to examine the books and papers of the said companies to ascertain the facts with reference to such manufacture and sale, with the usual power of accountants in such cases.

And counsel take this occasion to express their regret that the situation makes it necessary to again trouble the court in this matter, but the conduct of opposing counsel in view of the decision of the court herein, and also in view of what was said by both this court and opposing counsel upon argument, compels us to do so if we would avoid the delays threatened and manifestly sought by opposing counsel. The court will note that the motion is of the same import as the one made originally in December, 1918; that under the master's former ruling the opposing counsel had been engaged from April 17, 1919, to January 9, 1920, in the examination of L. P. Larson, Jr., in opposition to said motion, and had taken more than 1,000 pages of testimony during such examination as shown by the transcript in said cause.

That the undersigned counsel for the Larson Company finally determined to put an end to the practices of such opposing counsel, and the controversy then arose which led to the decision of this court on March 31, 1921. Neither the master nor opposing counsel seem to think anything was determined by that decision.

That the undersigned have taken down the mandate in the appeal case No. 2831 heard with the above entitled cause in this court, and filed the same in the office of the clerk of the District Court of the United States, where said cause is pending; that no mandate has been taken in the above entitled case and the same remains within the jurisdiction of this court.

That the undersigned will show that this manifest disregard of the decision of March 31, 1921, of this court by opposing counsel and the neglect to observe and carry out the views specifically stated by each of the judges on the argument of the said cause and in the opinions of this court, and the
1896 professions of opposing counsel with reference to filing such an account of the doings of the said corporations, organized after the cause was at issue, to wit, in January, 1916, are a part of a conspiracy to delay and obstruct the administration of justice, the particulars of which will be later furnished to this court.

In view of the fact that the subject-matter of this motion was covered by the petition for mandamus in this cause, the return of the judge to such petition, and the argument and briefs of counsel, it is not thought by the undersigned that any brief in support of this motion would be acceptable to the court.

Respectfully submitted,
CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Solicitors for L. P. Larson, Jr. Co.

1897 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In re Petition of L. P. Larson Jr. Company for a Writ of Mandamus. } No. 2822.

The L. P. Larson Jr. Company, petitioner herein, would respectfully advise the court that after the filing of the last opinion of this court in the above entitled cause, and the overruling of the petition for a rehearing therein it, by its counsel, gave notice to the counsel for the Wm. Wrigley Jr. Co., returnable before Master in Chancery Morrison on Wednesday, July 27, 1921, that on the date named it would ask an order in said cause directing "the Wm. Wrigley Jr. Company to file an account herein showing the profits of Wm. Wrigley Jr. Co., Ltd., and Wm. Wrigley Jr. Company, Proprietary, Limited, accruing from the manufacture and sale of Doublemint gum from the date of the organization of each of said companies to such date as each of said companies discontinued the use of the infringing dress on the Doublemint package," and that at the same time would move "the said master that an order be entered herein directing the above named defendant to allow Touche, Niven & Co., chartered accountants, to examine the books of the Wm. Wrigley Jr. Company, Ltd., at Toronto, Canada, said examination to commence without delay and to continue until completed."

That Mr. Mayer, of the Wrigley counsel, appeared on July 27, 1921, in response to said notice, and urged that the master take no action with respect to said motions because of the absence of his associate counsel, Mr. Lane, who it was stated

had an engagement before the Federal Court in Rhode Island and could not be here at that time; that counsel for your petitioner urged upon the said master that Mr. Lane's presence was unnecessary, as the matter had been adjudicated by this court, and that much time would be saved if the report was prepared by the Wrigley Company or its officers during the summer vacation; but the said master declined to enter the orders sought, or either of them, and directed that the said motions stand for hearing on September 22, 1921; that on the date last named the said motions were brought on for hearing and were argued on that day and the following day, the counsel for the Wm. Wrigley Jr. Company resisting the entry of such order, the counsel for the petitioner insisting that the right to have such an account had been adjudicated by the recent decision of this court, and what was said upon hearing of said cause when it was argued in this court. The master decided that he would not order such an account to be filed until he had heard such testimony as the Wrigley Company counsel desired to offer regarding the relations of the Canadian and Australian companies to the defendant Wrigley Company, and adjourned the further hearing owing to an engagement of Mr. Mayer of counsel, until October 11, 1921; at which time he directed opposing counsel to furnish to petitioner's counsel what they proposed to prove showing why no such order should be entered, and suggesting that perhaps your petitioner's counsel would admit the facts proposed to be proved.

And your petitioner files herewith, marked "Exhibit A," a true copy of the decision of the master so announced and entered of record in said cause and asks that it be taken as a part of this petition and motion.

And your petitioner further shows to the court that in its petition for mandamus herein (No. 2822) in paragraphs IX and X (Rec. 6 and 7) your petitioner set out the facts regarding the organization of the Canadian and Australian companies after the Wrigley suit on its Doublemint package against your petitioner for manufacturing and selling its Wintermint package had been commenced and after your petitioner's counterclaim had been filed, which was filed July 7, 1915; and also filed therewith a list of the shareholders in the defendant Wrigley Company, and also the Canadian and Australian companies (Rec. 59-61) and also showing the officers and directors of said three companies (Rec. 61) to which reference is hereby made, which shows that all the stock

1898

of the Australian Company except three shares of one pound each are held and owned by the Wrigley Company, and all the preferred stock of the Canadian Company is held by the Wrigley Company, and of the fifteen thousand shares of common stock therein all is held by shareholders in the Wrigley Company except sixteen hundred and eighty-four shares; that of the officers of the Canadian Company Wm. Wrigley, Jr. is president and director, and is also president and director of the defendant company; James R. Offield is a director of the Canadian and also of the Wrigley Company and also a son-in-law of Wm. Wrigley, Jr. and attorney for the defendant company. Nelson L. Buck is a director of the Canadian Company and general manager of factories of Wm. Wrigley Jr. Co. The Canadian company has five directors. When paragraph IX of the petition for mandamus was written, the writer thought Mr. Buck was also a director of the defendant company, a mistake which was corrected in this court; but his position as general manager of factories (Vol. 1 Testimony, p. 79) shows that the Wrigley Company has actual control of the Canadian Company, both through stock ownership and through the directory.

The controversy leading to the decision last made by this court arose, as the court's opinion indicated, upon your petitioner's motion to extend the accounting to the profits of these two companies so organized pendente lite and which companies had full knowledge of the litigation through the common knowledge of Wrigley, Offield and Buck of both companies. The record shows that the doings of both companies are reported either to the defendant Wrigley Company or to Mr. Wrigley as president thereof. And it is manifest that through the jurisdiction which the master and court has of the officers of the defendant company who control the other companies, the information sought can be obtained.

The question was thus mooted in the petition for mandamus; it was also made the subject of averment by Judge Carpenter in his return under the rule to show cause why he should not obey this court's mandate (Rec. 30, 32) and was, as petitioner is advised, necessarily decided by this court by its decision and directions, both in the mandamus and appeal cases, under the well settled rule that everything within the averments of the pleadings which was or might have been decided, must be deemed settled by the court's decision. (*Bates* v. *Bodie*, 245 U. S. 520, 526.)

Petitioner is advised by his counsel that this court decided

in the above entitled cause that your petitioner was and is entitled to an accounting from the defendant's "universal in place;" and that the defendant cannot subdivide itself and transfer its assets and infringing business in whole or in part after it has been called to account for its willful and malicious trespass upon petitioner's rights, and then deny its liability for the continued trespass of the artificial entity which it had created which it still owns (with the exception of a small interest acquired from its stockholders to whom it had distributed the common stock of the Canadian Company as a dividend), and which its officers and stockholders poten-
1899 tially control, and which entity had full knowledge through its executive officers and from the fact that the purchase was made lis pendens (*Merriam* v. *Saalfield* [C. C. A. 6th] 190 Fed. 927 and 198 Fed. 369); that such a situation creates one of the numerous instances where a court of chancery looks through and beyond the form, or entity so called, to the persons composing it.

And petitioner further shows to the court that the contention made by the counsel for the Wrigley Company that the master has no power to order such an account to be filed of the profits arising from the continued trespass of these "entities" created and at least potentially controlled by the defendant Wrigley Company, if he is convinced that the Canadian and Australian companies are not in fact controlled by the defendant, but that the managers are permitted to manage and control them as they see fit, without direction from the defendant company or its officers; that it is not a selling agency for the defendant company; that it was not formed for the purpose of escaping liability in this litigation or for any other purpose having relation to this controversy, but was formed solely for economic reasons having relation to the Candian business and its economical and profitable conduct, particularly because of certain taxes, import and export duties imposed by the Dominion of Canada, etc., and cannot in any event make such an order until after testimony on all such and kindred subjects has been heard by him,—is contrary to the opinion of this court on said mandamus and appeal hearing, the expressions of the several members of this court, uttered during the discussion of these issues at the bar of this court when the case was last heard, and also to the expressions and repeated assurances of these same counsel now denying the right of your petitioner to such an account except upon the conditions named, made to the court at the

time such cause was heard, as will more fully appear from excerpts from the language of the several members of the court during the argument, and of counsel, marked "Exhibit B" and attached hereto and made a part hereof.

And your petitioner submits the matter to this court, which still has jurisdiction herein, and asks the court to so modify or amend its order herein that the master and the opposing counsel may clearly know and understand that the right to such an account has been fully adjudicated and decided, and to the end that months and perhaps year may not be wasted in the useless and foolish discussion of the question.

And petitioner charges that said counsel, in view of the statements made by them to the court with reference to the account of profits on the Canadian and Australian business, do know and understand that this court has decided that such an account should be filed, and have made the present contention for purposes of delay and with the purpose of seeking a reargument of the question, and other purposes which will be developed later after said account is filed.

Your petitioner therefore presents this petition as a motion and asks that the order of this court be made clear enough so that opposing counsel will understand it and the master be not further misled by their arguments on this point.

And so your petitioner will ever pray.

L. P. LARSON JR. COMPANY,
By L. P. LARSON, JR.,
President.

CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Solicitors for Petitioner.

1900 State of Illinois, } ss.
County of Cook. }

I, L. P. LARSON, JR., on oath state that I am the President of the L. P. Larson Jr. Company and authorized to make this affidavit; that I have read the above and foregoing petition and know the contents thereof; that the same is true in all respects except as to matters stated upon information or belief, and as to such matters I believe it to be true.

And further affiant saith not.

L. P. LARSON, JR.

Subscribed and sworn to before me a Notary Public in and for said county and state, this 28th day of September, A. D. 1921.

A. G. LOVELESS,
Notary Public.

My commission expires October 19, 1923.

1901 EXHIBIT A.

Wrigley vs. Larson

Extract from proceedings of September 22d in re what Mr. Mayer intends to prove, etc.

Thursday, September 22, 1921.

* * * * * *

Mr. Mayer: * * * That's the only excuse you will have for not permitting us to put in further evidence, for not permitting us to put in facts showing how these companies operated with each other and towards each other. You ought to conclue, in my opinion, that there is already sufficient evidence in this record to deny their motion, but unless you so conclude, it will be your duty to permit us to put in all the evidence having any relation to this matter.

The Master: Now, right on that question: Do you expect to take testimony away from Chicago?

Mr. Mayer: I cannot answer that question yet. I would have to go into conference with the client and Mr. Lane, I would have to go through this record for the purpose of seeing exactly what proof we have and what there is yet to be supplied. I cannot answer your question except to say that it is within the possibilities we may have to take depositions, it is possible we would not have to do so. We may have some witnesses we can bring from abroad.

The Master: Are you prepared to state what you expect to prove?

Mr. Mayer: No, except in a general way.

The Master: I don't mean now.

Mr. Mayer: Certainly. There will be a time when we will be prepared to state exactly what we expect to prove, but I am not prepared to make that statement until I have gone through the record for the purpose of determining in detail and conferring with the witnesses.

1902 Wrigley vs. Larson

Extract from proceedings of September 34d in re ruling on motion.

Friday, September 23, 1921.

* * * * * *

The Master: I am not prepared to decide this motion now. There are some important questions to which I must give consideration and it seems to me the motion should not be disposed of until the Wrigley Company has had a reasonable opportunity to put in its testimony on the question.

Mr. Aldrich: I object.

The Master: How's that?

Mr. Aldrich: Well, finish.

The Master: The Larson Company had put in its testimony on the question as to whether the Wrigley Company should account for the profits made by the Canadian and Australian Companies and the Wrigley Company had begun to introduce testimony on its side when further proceedings before the master were suspended awaiting the decision of the court on the question as to whether Mr. Larson should be required to answer certain questions and furnish information asked by counsel for the Wrigley Company, and no further steps were taken before the master until this motion was entered. I think that counsel for the Wrigley Company should within a very few days state what they expect to prove or what witnesses they will call so that counsel for the Larson Company may admit, if they see fit, what counsel for the Wrigley Company expect to prove and in that way save time.

Mr. Aldrich: Do I understand this matter is decided, that the court is not going to allow an order, as I understand the court, to file an account until you have heard this testimony?

The Master: Yes, but I intend to push this case to as speedy a conclusion as possible and will go ahead on the main case regardless of this motion and am ready to do so whenever counsel so desire.

(After discussion and a consideration of the engagements of counsel an adjournment was taken until Tuesday, October 11, 1921, at 10:30 o'clock a. m.)

EXHIBIT B.

Excerpts of stenographic report of proceedings before the United States Circuit Court of Appeals, Judges Baker, Page and Evans sitting, commencing at 10 o'clock a. m. on the 29th day of October, A. D. 1920, in re petition of L. P. Larson, Jr. Company.

* * * * * *

Mr. Mayer: And then it appeared to them that sales were made by a Canadian corporation, not a party to this suit, and by an Australian corporation, not a party to this suit, were not included in the sales for which the William Wrigley, Jr. Company accounted.

They asked the Master to direct and order, to send out an auditor to make that examination, and to order us to account for that. There was suggestion, as to whether that should be done then or whether we should finish the hearing that was then on, and the Master said, "We will take that up now." I said, "very well." We have two defenses as to that, and we want to be heard." First, the question of law.

We claim that these corporations are not agencies, that 1903 they are not mere branches. They are separate legal entities. Mr. Aldrich is mistaken. He still persists in the mistake when he says that the majority of the directors of the Canadian Company are directors of the Wrigley Company. The Wrigley Company that I am appearing for that I am speaking for is a West Virginia Company.

I told the Master then that our position was as a matter of law that these companies were organized in good faith during the war, that there could be no exportation of gum over there, the duties were too high; there was no actual control over them; they were separate, independent companies. I also said, even if they were not separate, independent companies, even if they were made parties to this suit, still they ought not to be compelled to account because the sales of Doublemint gum in Australia could not by any possibility be sales for which the Wrigley Company would have to account; that we had been selling in every civilized country on the globe, we have been selling in China, Japan, and in countries I never heard of before, and we proposed to show that they did not do business there, that they had not the means or the

facility or the plant or the capacity, that they were never known there, that they had never sold anything there, and did not intend to go there. That the reason why we wanted to prove all those things was so that it could not be claimed that we went out there to forestall, being guided by a decision by this Court and of the Supreme Court in the Hanover case, and also in the Strauss v. Notaseme Hosiery case, and in other cases, and we propose to show affirmatively in this record that when we went into China we went there in good faith, and we will show your Honor the authorities.

* * * * * *

Judge Evans: That last is what I wanted. Now, the reason I brought that out was, it might have been, in view of the theories that he had, and in view of the fact that the Master was receiving the evidence to subsequently submit it to the Court, so that the decree might be entered thereon, that the condition that Judge Baker suggested would take place, namely, that the profits of the sales that were made in one locality where Larson did business would be separately reported from that where he did no business.

Mr. Mayer: Exactly.

Judge Evans: But they introduced their proof and asked you to account for the Canadian profits and you interposed the objection that if you proved a certain thing then they could not go into that account at all.

* * * * * *

Judge Evans: That rather seems to be his theory, that he was going to receive this evidence of Larson's to show that he was not transacting business there, for the purpose of preventing Larson from making any claim for profits against your company.

Mr. Mayer: That is it, exactly, as a reason why we should not account for the Australian sales, even if that corporation were owned and controlled and an agency and a part and a branch of our business.

Judge Baker: Does Judge Carpenter's entry that he made limit or modify in any way the Master from going ahead and reporting on the profits the Wrigley Company made in Australia from Doublemint or in Canada or other places?

Mr. Mayer: No, on the contrary; following out Judge Carpenter's order will permit that to be done. If these gentlemen maintain their position now it will not be done.

In other words, they made a cross motion to strike out
1904 all of the evidence that had already been introduced on this subject, to show when he first entered certain territory, what the extent of his business was, they want all of that out of the record. There is some in the record already. If you dismiss this petition for mandamus, you will be permitting the record to be made—

Judge Baker: Yes.

* * * * * *

Judge Evans: I think you said when I was asking you the question, that they were attempting to show that the report which showed a loss, the total business, did not include the Canadian and Chinese business, or somewhere else.

Mr. Mayer: It is conceded.

Judge Evans: That he wanted to go into that and you stopped them from doing so, interposing two defenses, one being, that it was another corporation, and the other defense being that this man was not engaged in business there. If you are right in that, there would not be any need for it.

Mr. Mayer: That is right. That is the situation. In other words, we account for, I think, twenty or thirty million dollars of sales. We did not purport to account for sales made by these foreign countries. They turned around to Master Morrison, and said, "We now want an order on them to include the sales of the two companies," to which I replied as already stated. There is a legal objection to that.

Judge Baker: Do you mean that the master rules as a matter of law on that?

Mr. Mayer: No, either party can go to the court on that.

Judge Evans: I can't see if you introduce your proof at this time that that would interfere with the duty of the master to go on into the investigation of your sales in Canada and China.

Mr. Mayer: I am not saying that. I understand that, your Honor.

Judge Evans: You stated that when these gentlemen sought to inquire into the sales in Canada and China—

Mr. Mayer: By companies in Canada and China—

Judge Evans: And in Australia, that you then indicated to the referee that that inquiry was not pertinent, for two reasons. One was that it was a separate company and the other was that it was a territory which Larson had not yet invaded.

Mr. Mayer: And further, never intended to invade and was not known there.

Judge Evans: Never intended to invade and was not known there.

Mr. Mayer: That is correct.

Judge Evans: I say, I can't see what that proof would have to do with the duty of the master in investigating this on the two theories that he was to report, first, upon the business of the foreign company where the Larson Company was an actual competitor, and the other one, as to the business of the Wrigley Company, involving the particular dress that you speak of in territory that Larson had not invaded.

Mr. Mayer: If the Master comes to the conclusion that this evidence should be received, so as to be in the record, so that Judge Carpenter can review it, so that you can then review it, the next question he will have to receive evidence on will be, why were these corporations organized, who owned the shares of stock, who are the directors, are these companies branches or are they not?

Judge Baker: Yes. The master did go into all that.

1905 Mr. Mayer: That is what he is doing.

Judge Baker: Yes.

• • • • • •

Mr. Aldrich: Will you permit an interruption to set you right?

Mr. Mayer: Yes.

Mr. Aldrich: By reference to the record?

Mr. Mayer: Certainly.

Mr. Aldrich: On page 23 of my argument, I say, first, to this question of whether we had sold the gum in Australia or Canada—

Mr. Mayer—What is the date of the argument?

Mr. Aldrich: April 18th, when the question was up and argued at length, when I say, on this question of whether we had sold gum in Canada or Australia, "I wish to be understood that I don't care whether we had or not. In fact, as I understand, we have sold some (should be "no") gum in Australia and only a few sales in Canada, if any. Now that does not end it there. It is unfortunate to have to have a controversy of this kind."

That is on page 23.

Judge Baker: It is the master's duty to go ahead with this investigation of the sales of the Wrigley Company everywhere in the world that the Wrigley Company has made sales.

Now, in order to have your question of law decided, according to the correct application in this Hanover case, you are entitled on your side to have them stipulate, and if they won't, you prove that they had not made any sales in Australia or had not made any sales in Canada.

Mr. Lane: That is the whole controversy.

Judge Baker: Then you would be entitled, of course, to present your evidence and they their evidence on their side about when and where and how the Canada corporation was organized, and when and where and how the Australia corporation was organized.

Mr. Lane: That is exactly what the trial court held.

Mr. Mayer: That is exactly what the trial court held.

Mr. Aldrich: No, he did not hold it.

• • • • • •

Judge Evans: When you made your statement of expenses and business in the United States, they asked you for a report on Canada and elsewhere.

Mr. Mayer: Yes.

Judge Evans: You said—"We do not want to give that because these people were not engaged in that business there—two reasons, one was that it was another corporation, and they were not doing business there." And the court said: "I will make you show that first," in effect saying that if he was not doing business in that market you did not have to report.

Mr. Mayer: The question that we are debating here with you is not that question at all. The question is whether it is proper or improper, whether it is like testimony in a divorce suit, to make Larson,—to prove, for us to segregate our business, when we tried to show—

Judge Evans: When your testimony was being put in?

Mr. Mayer: Yes, certainly.

Judge Evans: It seems to me that you should then try to show that this man was not doing business in these localities.

Mr. Mayer: Precisely.

Judge Evans: But they were introducing the proof, they were entitled to your figures.

• • • • • •

1906 Afternoon Session.

Judge Page: Let me find out whether I understand the situation. I understand that it is contended by Mr. Al-

drich that when the court here decided the question and ordered an accounting of profits, that meant profits, and that that meant profits anywhere and everywhere earned by the use of the thing that was—

Mr. Aldrich: By the infringing article.

Judge Page: Yes, and that the question as to whether—

Mr. Mayer: Wrigley.

Judge Page: Yes, the defendant in the suit below, or this suit, did business in that territory was of no consequence.

Mr. Aldrich: No, not at all.

Judge Page: I understand on your part that you contend that you should not pay any profits; that the question was not determined by this court as to what the profits were, but simply was a question of taking an accounting; and that it was not the Wrigley Company that was doing business in those territories inquired about, that is, Canada and Australia, but it was some other corporation; that if even if it was the Wrigley Company that they should not account; that there being no competition there, that you would not be liable to pay those profits if you made any; and that the question of the order of proof has been waived by both of you; that is, even though you did not have the right to put the proof in at that time, in that manner, that feature of it was waived, if it was a proper question to bring out.

Mr. Mayer: I think your Honor has stated it correctly.

Mr. Aldrich: That is true, with this modification, that is, that the master would not rule that they should file any accounting as to Canada and Australia until he had heard this kind of proof.

Mr. Mayer: And until, also, he had heard the proof that we are going to put in to show that we were not in control of those companies. What the master will ultimately decide, as to whether he will decide—

Judge Baker: The master's duty is to put in whatever basis there is for the respective contentions.

Mr. Mayer: That is it.

Judge Baker: Counsel ought not to waste their time and the time of the Master and everybody else by trying to prevent that being done.

Mr. Mayer: *We are not trying to prevent that. They are the ones that are doing that.* (Italics are ours.)

Judge Baker: They are not contending that they are not entitled to go into the question of profits at all. You have been making that contention since this morning.

Mr. Mayer: No, I beg your pardon. We have filed our account.

Mr. Lane: The full account.

Mr. Mayer: The full account has been filed long ago.

Mr. Aldrich: Showing a loss of $280,000.

Judge Baker: You were stating since luncheon that there was no occasion by virtue of the mandate of this court for the plaintiff to insist that it was entitled to hold you for profits.

Mr. Mayer: As one argument to show why the mandamus should not issue.

Judge Baker: I say, you ought not to spend any time on such matters. They are contending that they are en-
1907 titled to profits. The Master should furnish the basis on which, first, the trial court and then this court can determine that position of the plaintiff. You are entitled to have such evidence and such a report, from the Master as will enable, first, the District Court and then this court to pass on the correctness of your contention.

Mr. Mayer: *Precisely. That is exactly our position.*

Mr. Lane: *That is all there is to it.* (Italics are ours.)

Mr. Mayer: If I have said anything to indicate our position is different, I have been misunderstood. I am contending here that the Master—

Judge Baker: I have understood that you were insisting to the Master in the first place that the decree of this court did not authorize him to go into the question of profits at all.

Mr. Mayer: Oh, no.

Mr. Lane: No, no.

Mr. Mayer: No, I am misunderstood on that.

Judge Baker: What is the purpose of making your contention that you made since luncheon, that that is not within the decree of the court?

Mr. Mayer: Let me restate it, your Honor, because I have been misunderstood. This is an application for a mandamus, in which you are asked to direct Judge Carpenter how to decide a particular question. If he has decided any question that this court has decided—

Judge Baker: Yes.

Mr. Mayer: —in this case—

Judge Baker: Yes.

Mr. Mayer: —in conflict with that question—

Judge Baker: Yes.

Mr. Mayer: —there is a remedy—

Judge Baker: Yes.

Mr. Mayer: —that you will very quickly enforce?

Judge Baker: Yes, and a little bit farther. If the Master is not proceeding to do what in fact we told him to do we will direct the District Court to see that the Master does it.

Mr. Mayer: Surely, surely, that is it exactly.

Judge Baker: Except on the basis, that you indicated, to have the Master exclude this matter of profits, I fail to understand why you have been arguing this morning, or arguing since luncheon that the decree rendered by this court did not command the Master to go ahead and discover the profits that the defendant had made out of Doublemint.

Mr. Lane: May I make this one statement, your Honor? There is only one question. We filed a complete account, of course, we filed them covering everything.

Judge Baker: Yes.

Mr. Lane: That the Wrigley Company had.

Judge Baker: When it is shown that they did not cover your sales, speaking now from the plaintiff's point of view, the sales of the Wrigley Company through corporations which it created for selling purposes, thereupon it was the duty of the Master to have you proceed to state what those profits were?

Mr. Lane: He is just trying to do that. I want to be sure that we are clear on this. What the Master has done here is just to ascertain, on that point, whether these parties have any relation to the present Wrigley Company, or are within the jurisdiction of the court. The Master has taken testimony on that question.

1908 Judge Baker: Well, he is taking testimony, but he should take the testimony and he should comply with the order.

Mr. Lane: He has already said, if he sees any sign of relation he will order that particular thing. He has already said that.

Judge Baker: He said what?

Mr. Lane: He said he will order that, if there is any showing of relationship between the parties.

Mr. Mayer: He is taking evidence on that now.

Mr. Lane: He is taking evidence on that now.

Judge Baker: He must take the evidence. It is immaterial how he views the law on that evidence. He must take the evidence in order that the District Court first, and then this court—

Mr. Lane: That is just what he is trying to do, your Honor.

Judge Baker (continuing): —may say what is the legal effect of that.

Mr. Lane: He is now taking that evidence.

Mr. Mayer: He is taking it.

Judge Baker: Then you ought to be down there before the Master.

Mr. Lane: That is what we think.

Mr. Mayer: That is just what we think.

Judge Evans: Just a minute, may I ask a question of Mr. Lane? How does any inquiry as to whether Mr. Larson is doing business in Canada or Australia bear upon the question of whether these companies were separate and distinct from the Wrigley Company?

Mr. Lane: They do not have anything to do with that proposition, your Honor.

Judge Evans: I was asking that because you said the Master was inquiring into the business done in Australia or Canada.

Mr. Lane: Well, we were going into that proof. Perhaps you don't understand—

Judge Evans: In order to go on with that proof, you inquire what Mr. Larson was doing.

Mr. Lane: No, as we get along, developing that question, it came up to the question of whether there was competition or no competition between the parties anywhere. On that theory of the case, when we got into that, then the other side said, "Why, we don't make any point on the order of the proof of that question," and from that time on we agreed to pay the expenses of the Master, the charge the Master is making, the stenographer's expenses, and put that in as part of the case because it sort of led right on from the other proof, that is all.

Judge Baker: Yes, but all the basis for your insistence that if you got the Master to believe that these were stranger corporations in Canada and Australia that he would not—

Mr. Lane: Oh, no, your Honor.

Judge Baker (continuing): —that he would not develop the profits.

Mr. Lane: No, that is not the proposition.

Mr. Mayer: No.

Mr. Lane: We were going on the theory—

Judge Baker: And you proved that the Larson Company

had never yet been able to extend its business beyond thirty-six states of the union and not at all into China, Australia or Canada, that thereupon the profits except within the thirty-six states should not come within this question.

1909 Mr. Lane: That is not a fair statement. We have put in all the parties. That is, we filed an original account covering not only the territory where they were, but we put in every foreign country. That is all before the Master. The Master has been very strict in ordering every bit of that in. That is all right in there. The only question now is that the Master would, if this were allowed, prevent us from putting in certain testimony relating to the ultimate question that we are to argue here, that they are not entitled to an accounting of profits in territory where they did not go, but that had nothing to do with the question of whether the Master should order that proof in.

Judge Page: Has he ordered the other accounts, the profits through the Australian and Canadian corporations?

Mr. Mayer: We have not decided that question yet. Let me read you the stipulation.

Judge Baker: Wtll, he should go ahead with that. Your motion is that that evidence should be postponed?

Mr. Aldrich: Exactly.

Mr. Mayer: It has nothing to do with the matter now on hearing. The question now on hearing is whether evidence of that type—

Judge Baker: It has got a good deal to do with it. There has been a great deal of delay, may be mutual, by virtue of making contentions before the Master with respect to the legal propositions and the legal rights that should be postponed until the facts and all of the facts upon which the question may be finally decided are brought out and found by the Master.

Mr. Mayer: Our position is that the Master, whether he thinks evidence is material or not, has got to receive it so that the District Court can determine—

Judge Baker: Yes.

Mr. Mayer: Whether it is or is not proper.

Judge Baker: Yes.

Mr. Mayer: And the District Court must do the same thing.

Judge Baker: *Then, why are you trying to obstruct the inquiry into the profits of the Canadian and Australian companies?* (Italics are ours.)

Mr. Mayer: We are not trying to obstruct that. We want to get into this record all of the facts so that however the Master decides, however Judge Carpenter decides, we can get the opinion of this court based upon the facts.

• • • • • •

1911 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

L. P. Larson, Jr., Company, } No. 2822
vs. } No. 2831
Wm. Wrigley, Jr., Company.

Proceedings had on motion before the United States Circuit Court of Appeals for the Seventh Circuit (Judges Baker, Alschuler and Evans sitting) on October 4, 1921, at about 11:30 o'clock A. M.

Appearances:

Charles H. Aldrich, Esq., and Frank F. Reed, Esq., appearing on behalf of the L. P. Larson, Jr. Company.

Isaac H. Mayer, Esq., and Wallace R. Lane, Esq., appearing on behalf of the Wm. Wrigley Jr., Company.

Mr. Aldrich: If the court please, in No. 2822, which is the mandamus case, you will recall at the last term of this court there were two cases heard together, 2822, which was
1912 the mandamus case and 2831, which was the appeal case. In 2831 a mandate of this court was taken down and filed in the District Court, the clerk's office.

In this case, as the motion we are now making will show, no mandate was taken down and the case remained in this court. We made a motion returnable the 27th day of July, that the Wrigley Company, the defendant, be ordered to file an account as to the profits of the Canadian and Australian corporation.

Mr. Mayer: Mr. Aldrich, may I interrupt a moment, with the Court's consent:

Mr. Aldrich: I would like to present my motion, if you haven't any objections.

Mr. Mayer: I merely want to suggest to the Court by way of this interruption, that I would like to know whether you are going on with this now. I want to know if you are going to argue the question, whether you want to hear this motion now or not. If you are going to argue it, I would like to make a statement on the subject, after counsel has argued the motion.

Mr. Aldrich: I do not intend to make any argument as indicated by the motion papers, if the Court please.

Mr. Mayer: Well, pardon, me for the interruption then.

1913 Mr. Aldrich: I will just state the facts and will make no argument.

I have suggested, at the end of the motion papers, that in view of the very full discussion that has been had of these matters before the Court we think if it would be agreeable to the Court, that it would be well to submit the matter without further argument or briefs. If the Court shall be of a different opinion and desire argument on it, although it is a matter which it seems to me has been fully agreed and decided, it will be otherwise, of course, and we desire to be heard if the other side is heard.

We made our motion, as I was stating to the Court when I was interrupted, returnable on July 27.

Judge Baker: What is there here?

Mr. Aldrich: The Master has refused—

Judge Baker: No, what is there here? Both 2822 and 2831?

Mr. Aldrich: No, just 2822. That case remains in this Court and my motion papers are printed, if the Court please.

Judge Baker: Yes.

Mr. Aldrich: So that that motion is here.

Judge Baker: Yes.

1914 Mr. Aldrich: We asked that the order be entered July 27, Mr. Mayer objected on the ground that Mr. Lane was engaged in Rhode Island in the Federal Court and he needed his presence. The Master continued it until September 22 and the matter has been argued, on September 22 and 23, and the Master has decided that he will order no accounting as to the Canadian corporation or the Australian corporation until he has heard the evidence. We repeatedly in the record stated that if there was an evidence that changed the conditions that we set out in our petition for mandamus, which showed the organization of those companies, of course,

such evidence which the Master deemed material would be heard.

It is the opinion of counsel, for the Larson Company that the conduct of the Master and the contentions made by the opposing counsel are again a defiance of what the Court has specifically decided and we, therefore, as the case was yet here, in compliance with the suggestion that your Honors made in both opinions that have been filed, while the case is yet here, again call this matter to the attention of the Court and submit it on the papers.

Judge Baker: Well, the Master has—

Mr. Aldrich: He doubts—he says you have warned
1915 him in the last opinion to go into no excursions. He don't know as to whether he has any right to go into the dealings of these companies.

Judge Baker: Yes.

Mr. Aldrich: And require any accounting.

Judge Baker: Now, Mr. Aldrich—

Mr. Aldrich: And each of you gentlemen—

Judge Baker: I beg your pardon.

Mr. Aldrich: Yes, I beg your pardon.

Judge Baker: Have you applied to the District Court?

Mr. Aldrich: No, because the case was yet here and your Honor has indicated that we could—

Judge Baker: We never—

Mr. Aldrich: We ask you to amend your order so the meaning of your opinion will be made clear to those gentlemen who seem to be incapable of understanding it.

Judge Baker: The Master is in the hands of the Chancellor. We will not undertake to review anything that the Master is doing. We have not. The mandate was directed to the Court.

Mr. Aldrich: There is no mandate in this case yet. It has not left this Court.

Judge Baker: What?

1915½ Mr. Aldrich: No mandate in this case has yet left this Court.

Judge Baker: Well, it should have, shouldn't it?

Mr. Aldrich: No, not necessarily.

Judge Baker: In No. 2822 the writ was issued.

Mr. Aldrich: Yes.

Judge Baker: Now, if the writ is issued that case is ended.

Mr. Aldrich: The writ has not issued.

Judge Baker: Well, then, it should have been issued and we will consider it as though it had been issued.

Mr. Aldrich: If the Court will consider it—

Judge Baker: The Court issued the writ. Somebody should have taken it down. Somebody should have served it, or whatever was necessary to do. If the Master is not doing what you think he should do under the law, you must apply to the District Judge.

Mr. Aldrich: I will do so, then.

Judge Baker: That will be our ruling.

Mr. Aldrich: I will do that.

Mr. Mayer: In view of that, your Honor, there is nothing further to dispose of. The motion is denied, I presume.

Judge Baker: Yes, yes. He isn't our Master. We
1916 have no dealings with him.

Mr. Aldrich: That will make another appeal necessary, probably.

Judge Baker: All right. I don't know whether it will or not.

Mr. Mayer: If there is another appeal your Honor will find the situation was not properly presented to your Honor just now.

Mr. Aldrich: Will the order be here that the motion is denied with leave to apply to the District Court?

Judge Baker: No, we will not make any suggestions about advising the parties as to what they may do in other courts.

Which were all of the proceedings had on the hearing of the motion above referred to.

254 And on to-wit: the 13th day of November, A. D. 1923, there was filed in the Clerk's office of said Court a certain Masters' Report, in words and figures following to-wit: Filed Nov. 13, 1923.

256 • • • No. 488 • • •

To the Honorable, the Judges of Said Court:

The undersigned, C. B. Morrison, Master in Chancery, respectfully represents unto your Honors that the above entitled cause was referred to him as hereinafter stated. Pursuant to the reference, the parties appeared before the master on the 16th day of October, 1918, and on divers days thereafter, and thereupon oral testimony and documentary exhibits were offered and introduced in evidence and other proceedings had and taken as will more fully appear by the transcript of such testimony and proceedings herewith returned into court.

The taking of testimony was closed on the 11th day of June, 1923, oral arguments were thereafter made by counsel and the case taken under advisement.

257 Preliminary.

Wm. Wrigley Jr. Company is a corporation organized under the laws of West Virginia January 1, 1911, to manufacture and sell chewing gum, with its principal office at Chicago. It was the result of a merger of Wm. Wrigley Jr. & Company and the Zeno Manufacturing Company, both Illinois corporations, and took over the business and properties of those two corporations. Therefore the Illinois Wrigley Company had been engaged in the business of selling gum manufactured for it by others; the Zeno Company had been engaged in manufacturing and selling gum, a large portion of its output being sold to the Illinois Wrigley Company.

L. P. Larson Jr. Company is a corporation organized under the laws of Illinois in July, 1911 to manufacture and sell chewing gum, with its principal office at Chicago.

On the 15th day of June, 1915, the Wm. Wrigley Jr. Company, hereinafter called the Wrigley Company or Wrigley, filed its bill of complaint against the L. P. Larson Jr. Company, hereinafter called the Larson Company or Larson, alleging that confusion existed and would continue between

the Wrigley Doublemint package and the Larson Wintermint package. The Larson Company in its answer and coun-
258 terclaim accepted the Wrigley Company's position as to similarity and confusion but denied that Wrigley's Doublemint was the first to be placed upon the market, asserting that it was brought out to undermine Larson's trade in Wintermint, and prayed for injunction and accounting. The District Court dismissed the bill and counterclaim and from this order the Larson Company appealed. That portion of the decree dismissing the counterclaim was reversed and the case remanded to the District Court with directions to enter an injunction and order an accounting. It is unnecessary to make further recitals relating to the proceedings prior to the decision of the Circuit Court of Appeals as they have been clearly stated in the decisions of that court in 253 Federal 914 and 275 Federal 535.

Following the mandate, a decree was entered by the District Court on October 14, 1918, enjoining the Wrigley Company etc. and referring the case to the master to take "an account of all the gains and profits of Wm. Wrigley Jr. Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined from the first sale on July 28, 1914, to the date of the entry of this decree and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until compliance therewith."

The accounting period begins July 23, 1914, the day the first package of Doublemint gum was sold, and ends November 12, 1918, the day Doublemint ceased to be sold in the infringing dress.

259 **Findings**

On the 16th day of October, 1918, on motion of the Larson Company, an order was entered by the master directing the Wrigley Company to file an account under federal equity rule 63 within a time specified. The time was extended to enable the Wrigley Company to complete its account, and on December 3, 1918, an incomplete account was filed covering the period from July 28, 1914, to August 24, 1918, at which time an immaterial change was made in the wrapping of the individual sticks, the general appearance in the outside of the package remaining the same.

On December 10, 1918, the remainder of the account was

filed, bringing it down to the close of the accounting period. This second part of the account is divided into two periods, the first ending at October 4, 1918, when Wrigley ceased making sales of its Doublemint gum in the infringing dress in the United States, the second ending November 12, 1918, when it ceased everywhere to make sales in the infringing dress.

The accounts filed have been marked Wrigley Company's Account: Pats 1 and 2 and are hereafter called the filed account.

260 The Larson Company objected to the filed account putting in issue practically all of the matters stated in the account, but shortly thereafter it accepted as correct the amounts stated as the cost of manufacture per box, the sales and the amounts received therefor.

On March 6, 1919, the Wrigley Company filed a supplementary statement purporting to adjust the filed account. It was not merely an adjusting statement, but presented claims on subjects not before mentioned: $379,258.23, manufacturer's profit on Doublemint; $519,811.08, Doublemint's proportion of difference between acutal cost of chicle and the market value of same when used; and $22,182.47, donations and sundry amounts paid for advertising. This March 6th statement in so far as it relates to adjustments of matters covered by the filed account should be considered as a part thereof.

The filed account purports to cover the entire business in Doublemint carried on by the Wrigley Company everywhere throughout the accounting period except the business that was carried on through the Canadian and Australian companies after their incorporation about January 1, 1916. It shows a loss for the entire period of $272,627.53. On inspection it shows a recoverable profit of $353,905.22. The apparent loss is produced by deducting from the profits made

261 in 1917 and 1918 the losses sustained in the previous years. This is not permissible in accounting cases.

The decree empowered the master to employ accountants to examine the books of the Wrigley Company to ascertain the profits, if any, accruing from the sale of Doublemint. Under this provision in the decree, the master, on the application of Larson and with the consent of both parties, on December 10, 1918, appointed James Hall of the firm of Marwick, Mitchell, Peat & Company as such accountant. Mr. Hall was sworn to faithfully perform the duties of his ap-

pointment as required by the decree. At Mr. Hall's suggestion Edward Gledhill and others who were connected with the firm of Marwick, Mitchell, Peat & Company were appointed to work under Mr. Hall in examining the Wrigley Company books, and each took the same oath as that administered to Mr. Hall. It was agreed that Mr. Hall should take directions from the master and not from either party to the suit, and from time to time the Larson Company submitted to the master requests for information to be taken from the Wrigley books. These requests were communicated to Mr. Hall, by him complied with, and the information gatheed by him was included in a preliminary report submitted June 17, 1920, and made a part of the record. Trans. 6895. Mr. Hall did not intend that this report should be final, he assumed that further requests for information would be made and a final report prepared, but as no further requests were made no further report became necessary.

262 On March 7, 1919, counsel for the Larson Company requested permission to have Edward R. Burt & Company, certified public accountants, examine certain accounts carried on the books of the Wrigley Company, counsel for the Wrigley Company consented that the examination be made, and on March 28, 1919, a report made by Burt & Company was filed, marked "Exhibit Burt Statement." Little, if any, use has been made of this report.

On April 20, 1920, on Larson's motion, with Wrigley's consent, Touche, Niven & Company, certified public accountants, were authorized to examine the Wrigley books and records touching the matters in issue. Trans. 2390-1. The examination was made and on November 16, 1921, the report made by Touche, Niven & Company, showing the result of its examination, was introduced in evidence as Larson Exhibit 132, hereafter referred to as the Touche-Niven report. This report shows a profit on Doublemint of $2,840,528.74 exclusive of good will and interest on profits.

After the Larson Company's testimony had been closed the Wrigley Company on March 6, 1923, introduced as Wrigley Exhibit 92: Benington 1 a statement of account purporting to correct and revise the filed account and adding a claim for a deduction on account of interest on capital invested in good will at the beginning of the accounting period. The account was prepared by Ernest Reckitt & Company, certified public accountants, and shows a loss on Doublemint of $691,560.76. It is hereafter referred to as the Reckitt report.

263 MANUFACTURING COST AND SALES

At the beginning of the accounting period the Wrigley Company had a well established business in Spearmint gum which was then, and continued to be, its principal brand. Doublemint was put on the market July 28, 1914, and Juicy Fruit as an advertised brand in the latter part of 1915. While the company had other brands, they were not pushed and their sales were negligible as compared with the sales of the three principal brands.

The Wrigely Company carried on its business as an entirety and its books were not kept with a view to show separately the sales and the cost of manufacture of the various brands handled. All gum produced by the company was made in the same factories and composed of the same elements, the only difference being in flavor, name and dress of the different brands, and it is conceded that the cost of the different brands is the same.

The sales of the various brands are capable of separation by an examination of the invoices. The sales of Doublemint as thus ascertained together with the total sales and the percentages of Doublemint sales to total sales are here shown by years:

264

	Total Sales	Doublemint Sales	Percentage of Doublemint to Total Sales
7/28 to 1/31/14	$ 3,522,732.30	$ 570,426.40	16 1927
1915	9,717,145.33	1,816,332.08	18 692
1916	12,482,342.87	2,049,964.85	16 4229
1917	15,713,657.84	2,348,003.49	14 9424
1/1 to 11/12/18	15,214,994.80	2,132,560.08*	14 016
	$56,650,873.14	$8,917,286.90	15.74

*The sales of Doublemint in the United States from October 5th to November 12th, inclusive, are not included as the infringing dress was discarded in this country at October 4, 1918.

264 The sales of Doublemint throughout the accounting period, $8,917,286.90, the manufacturing cost thereof, $3,764,597.58, and the gross profit, $5,152,689.32, given in the filed account, were accepted by the Larson Company as correct.

265 DEDUCTIONS

The filed account, the Touche-Niven report and the Reckitt report differ as to the items and the amounts thereof proper to be deducted in arriving at profits. For comparison purposes the deduction figures used in these accounts are here listed in parallel columns.

	Filed Account	Touche-Niven Report	Reckitt Report
Advertising	$2,794,651.76	$1,017,183.59	$2,872,844.43
Overhead Expenses	952,833.95	844,336.93	969,669.35
Loss on Sale of Merchandise with Doublemint	38,166.27	12,258.41	12,258.41
Loss by Fire at Belize	1,700.30	.....	1,700.30
Cost of Printing United Profit Sharing Coupons	6,334.86	6,915.30	7,453.38
Amount paid for United Profit Sharing Coupons	330,320.71	332,885.56	332,946.71
Contingent Liability for Unredeemed United Profit Sharing Coupons	317,581.15	98,580.79	314,252.03
Depreciation on Patents and Patent Rights	64,267.43	.....	64,267.43
Federal Income and Excess Profits Taxes	563,933.89	.....	621,108.97
Interest on Capital Invested in Tangible Assets	306,345.38	.....	304,489.89
Interest on Capital Invested in Patents and Patent Rights	49,181.15	.....	52,804.27
Interest on Good Will	.....	.....	290,454.91

The items in the above list and other matters in controversy are dealt with in this report.

266 ADVERTISING

The total amount paid out for advertising during the accounting period, exclusive of donations of money, amounts to $6,798,662.73, and this figure is not in dispute. The classes of advertising making up this amount are: Newspapers and Magazines; Billposting; Walls, Bulletins and Electric Signs; Street Cars; Foreign Advertising; Miscellaneous; Advertising Allowances to Jobbers; D. M. Cards Redeemed and Samples; Advertising Matter; Detail Men; and War Tax Rebate Certificates.

The question is what plan shall be adopted to separate the cost of Doublemint advertising from the total cost of adver-

tising to the end that Doublemint shall be required to bear its just proportion and not more.

The Larson Company contends that in the above amount there is advertising of an institutional character the benefit of which Wrigley received and that Larson should not be charged therewith. It claims the decree directs that advertising cost be apportioned on the basis of sales and that in carrying out this provision the cost of institutional advertising should be first eliminated and the remainder apportioned on the basis of sales.

267 The Wrigley Company contends advertising was placed to sell brands and if there was also an institutional value, it was incidental and should not be considered in this accounting. It claims that advertising should be divided on a space basis. By this method where Doublemint is the only brand advertised the entire cost of the advertising is charged to Doublemint, and where Doublemint is advertised with one or more other brands the cost of the advertisement is divided among the brands advertised according to the relative space each occupies. Using the space method, the Wrigley Company claims Doublemint's portion of the total advertising is $2,872,844.43.

The display advertising placed during the accounting period falls into two general division, institutional and specific or brand advertising, and it is essential for a proper accounting in this case that these divisions be separated to the end that that which is institutional shall be set aside to be otherwise dealt with and that which is specific shall be divided among the brands advertised.

In 1914 and prior thereto the Wrigley Company in its advertising placed emphasis upon the brands advertised and the language in the advertisements referred directly to such brands. At the beginning of 1915 there was a change of

268 policy in that respect; the name "Wrigley's" began to be displayed in prominent letters and became increasingly prominent letters throughout the accounting period and during the greater part of the period was the dominating feature in all display advertising, the general language of the advertisements referred to the name "Wrigley's" rather than to the brands advertised. The name "Wrigley's", whether prominently displayed or appearing on the pictures of the packages of the brands themselves or elsewhere in the advertisements, the spears and spear men and the descriptive literature relating to the business are so commingled

and interwoven with brand advertising that an accurate separation of brand and institutional advertising cannot be made, and unless one method can be found that enables a substantially accurate separation, the conclusion is coerced that by reason of admixture institutional and brand advertising are inextricably mingled.

A number of witnesses, business men, auditors and advertising experts, testified in effect that advertising such as that placed by the Wrigley Company is brand advertising and should be charged against the brands. They admit that such advertising has an institutional value, but assert that it was placed for the purpose of selling the brands and that
269 the brands should bear the entire expense thereof, and that this rule should prevail as between Wrigley and a third party who has become entitled to a portion of the profits of the business.

The manner in which any element of advertising shall be carried on the books of a company is an immaterial matter so far as the company itself is concerned and has no binding force upon a third party that has become entitled to a portion of the profits of the business. Whether Larson in this case should be charged with institutional advertising is a question of law upon which the opinion of witnesses is of little, if any, value.

The space basis is sometimes the best method for dividing advertising, but where the volume, the details and the complexity of the accounts are so great as in this case, and the books and records were not kept with a view to that end, it is impossible to divide advertising cost with reasonable accuracy by this method.

Without passing upon the question as to whether the decree directs the method by which advertising shall be divided, the contention of the Larson Company has been substantially accepted as the most suitable method to do justice be-
270 tween the parties with the modification that the institutional advertising is amortized over a period of four years.

A separation of institutional and brand advertising is made with reasonable accuracy in the manner following. An analysis has been made of display advertising done by the Wrigley Company as illustrated by photographic copies of advertisements bound in the transcript and by the seven books of advertising produced before the master and marked Larson Exhibits 30 to 36 inclusive. The percentage of institu-

tional found in each class of advertising has been determined and deducted from the total and the remainder has been divided among the brands advertised on the basis of their relative sales. While all samples of the different classes of advertising may not have been before the Master, those produced were sufficient in volume and so diversified in character as to be representative and enable accurate conclusions to be reached.

Doublemint benefitted during the period by institutional advertising done during the period and the full value of such advertising was not on hand at the end of the period. Amortization gives effect to the diminishing value of institutional advertising and serves to charge against Doublemint and benefits Doublemint derived therefrom. Four years has
271 been selected as a reasonable period over which the value of institutional advertising would extend. Doublemint's portion of the amortized value falling within the period has been ascertained on the basis of Doublemint sales to total sales of advertised brands.

It may be said against the sales method that sales do not always respond in proportion to the advertising expended and especially where a new article or brand like Doublemint is placed on the market. This contention could be advanced if the Wrigley Company had ceased to sell gum under the name "Doublemint" at the close of the accounting period, but as it continued to use the name "Doublemint", it is fair to assume from its experience with other brands that the returns on Doublemint will finally fully recompense it for the advertising cost. It is believed that by adopting the sales method Larson has been fully compensated for any value remaining in the name "Doublemint" at the end of the period.

The following table shows the percentages of institutional arrived at for the different years on the several classes of advertising containing institutional, the total amount expended for each class and the part that has been eliminated as institutional:

PERCENTAGES

Class of Advertising,	7/28 to 12/31/14	1915	1916	1917	1/1 to 11/12/18	Total	Institutional
Newspapers and Magazines	1.632	51.363	67.523	67.601	67.616	$1,587,579.63	$ 853,385.11
Street Car Cards,	11.27	11.97	53.00	67.144	53.08	1,417,006.97	619,518.28
Bill Posting,	3.11	2.293	62.275	56.247	51.373	1,151,510.33	446,201.47
Walls, Bulletins and Electric Signs	3.11	2.293	62.275	56.247	51.373	964,524.75	301,636.34
Foreign,	Nil.	Nil.	67.523	67.601	67.616	28,200.73	19,056.99
Mother Goose Booklets,	Nil.	51.363	67.523	67.601	Nil.	116,400.00	69,146.53

273 In addition to the classes of advertising named in the preceding table there are certain other classes that do not contain institutional advertising. Doublemint's portion of such items, with the exception of detail men and war tax rebate certificates, has been ascertained in the same way as its share of brand advertising was ascertained above, that is, on the basis of Doublemint sales to total sales of advertised brands.

The Wrigley Company in its accounts assigned to Doublemint in 1914 and 1915 50%, in 1916 35.54%, and in 1917 and 1918 33.33% of the cost of detail men. The duties of detail men are general in their nature and Doublemint's share of the cost thereof has been ascertained in this report on the basis of Doublemint sales to all sales.

In order to absorb a sale tax the Government placed on gum during the accounting period, the Wrigley Company packed in its boxes of gum containing twenty five-stick packages war tax rebate certificates redeemable in Doublemint or Spearmint gum at the rate of one box of gum for each sixteen certificates. The amount chargeable to Doublemint on account of these certificates has been arived at by ascer-
274 taining the number of boxes of Doublemint given in exchange therefor, multiplying that number by the manufacturing cost of the gum per box and adding the cost of freight or postage. Wrigley Exhibit 65: Stanley 33.

The Wrigley Company donated various sum of money to patriotic, benevolent, religious and business organizations aggregating $191,267.62 of which it claims $28,740.38 should be charged against Doublemint on the sales basis.

For a small portion of the amount paid out the company received advertising on programs and local trade papers, etc., but the value received from an advertising point of view is small and cannot be ascertained. The greater portion of the above sum was given to organizations doing patriotic work during the war such as the Red Cross. These donations helped to build up good will for the Wrigley Company and it is doubtful if they had any other effect though they may to some degree have benefitted sales, but if so, the benefits derived were not great and are incapable of ascertainment. Nothing on account of expenditures of this kind should be deducted from Larson's profits.

275.

SUMMARY OF ADVERTISING.

	7/28 to 12/31/14	1915	1916	1917	1/1 to 11/12/18	Total
Doublemint's portion (based on ratio of Doublemint Sales to total Sales of Advertised Brands) of Advertising from which Institutional has been eliminated,	$100,030.43	$206,710.94	$ 80,651.69	$ 65,623.50	$ 64,264.03	$517,280.59
Doublemint's portion (based on ratio of Doublemint Sales to total sales of advertised brands) of Institutional Advertising as amortized,	453.70	14,304.44	43,032.20	67,480.79	79,808.65	205,079.78
Doublemint's portion (based on ratio of Doublemint Sales to total sales of Advertised Brands) of Advertising containing no Institutional features,	29,448.11	24,444.65	23,279.47	18,485.00	12,331.40	107,988.63
Doublemint's portion of Salaries and Expenses of Detail Men (based on ratio of Doublemint Sales to total Sales),	3,678.62	19,280.52	21,611.06	21,962.23	6,448.81	72,981.24
Doublemint's portion of cost of redemption of War Tax Rebate Certificates,	57.68	36,524.54	48,666.44	7,010.80	537.75	92,797.21
—Total—	$133,668.54	$301,265.09	$217,240.86	$180,562.32	$163,390.64	$996,127.45

276 Overhead Expenses

In the filed account the Wrigley Company claims credit for amounts paid out for general, selling and administrative expenses, described by it under the general term of "Overhead" and arrives at Doublemint's portion thereof on the basis of Doublemint sales to total sales. The Touche-Niven report changed and eliminated some of the items entering into this account and later the Reckitt report also made revisions.

$682,911.06 of the overhead expenses chargeable to Doublemint is not now in dispute and it is not necessary to deal separately with the items entering into this amount. Those items as to which there is a dispute have been separately considered and conclusions reached as stated below:

Depreciation on Buildings;

Tax on Essential Oil;

Salaries and Expenses of Brooklyn and Toronto.

Credit is claimed by the Wrigley Company for $2,617.52, deprecitaion on buildings for the period July 28th to December 31st, 1914; $49.17, tax paid on essential oil in the period January 1st to August 24th, 1918; and $560.03, salaries and expenses of Brooklyn and Toronto Agencies for the period July 28th to December 31st, 1914.

277 These are items of manufacturing cost, and, as Larson accepted the manufacturing cost as stated in the filed account, they are conclusively presumed to be included therein and should not be allowed as overhead.

Illinois Manufacturers' Association.

An item of $4.95 should be allowed as a charge against Doublemint on account of a payment made to the Illinois Manufacturers' Association for reports on war department rules.

George F. Desbien

Claim is made in the period July 28th to December 31st, 1914, for $105.09 on account of expenses of George F. Desbien, a representative and traveler of the Wrigley Company. Desbien was employed to sell Spearmint and Doublemint in the far east and necessarily incurred expenses. While it does not appear that he sold much, if any, Doublemint during the time, Doublemint is properly charged with its portion of the expenses incurred.

Paris Advertising;

Paris Office Salary and Expenses;

Paris Office Fixtures.

Claim is made for $110.05, Paris advertising; $450.26 Paris Office salary and expenses; and $111.41, Paris office fix-
278 tures. These expenses were incurred in an effort on the part of the Wrigley Company, beginning in July 1914, to establish an office in Paris, France, to sell Spearmint and Doublemint gum. After some expenses had been incurred it became necessary to abandon the enterprise owing to war conditions, and while no Doublemint gum was sold by the Paris office during this time, it should bear its portion of the expenses incurred.

Refund of Misappropriation.

$200.57 should be credited to Doublemint because of a refund by a bonding company on account of misappropriation of funds by an employe of the Wrigley Company.

Frank F. Pulver.

Claim is made for $33,107.48 on account of Doublemint's portion of $120,000.00 paid during the accounting period on notes given by the Wrigley Company to Frank F. Pulver. An infringement suit was begun by the Wrigley Company against Pulver and was settled in December 1913. In the settlement the Wrigley Company paid Pulver in cash $100,000.00 and gave five notes, each for $30,000.00, due on December 31st, 1914, 1915, 1916, 1917 and 1918, and Pulver turned over to Wrigley his property consisting of machinery, supplies, trademarks, etc., and agreed not to enter into the gum business for a period of years. Four of the notes and
279 interest were paid by Wrigley as they came due during the accounting period.

The payment of these notes during the period was a liquidation of a liability created before the period began and without any reference thereto. Whatever the Wrigley Company acquired from Pulver became a part of the property of the Wrigley Company and the payments therefor should not be treated as an expense.

Cost of Alterations of Main Office.

The Wrigley Company claims credit for $418.10 on account of expenses of painting and altering its Chicago office in the period July 28th to December 31st, 1914. The Larson Com-

pany contends that this expense should be charged all over the life of Wrigley's lease which would make a charge of $114.19. Larson's contention has been accepted as fair and just between the parties.

Plans for Factory Additions.

Claim is made for $748.23 on account of an amount paid for plans for an addition to the Chicago factory buildings. These plans were never used. According to the Reckitt report, they were ordered March 15, 1917, delivered January 2, 1918, and paid for November 19, 1918, after the close
280 of the accounting period. Doublemint received no benefit from this expenditure and it is impossible that it would have received any material benefit during the accounting period even if a building had been erected in accordance with the plans as it is unlikely that such a building would have been completed before the close of the accounting period. It is not a proper expense item, but should have been charged to the cost of building.

Legal Fees—Canadian Company.

There is included in the filed account a claim for $217.26 for legal and other expenses paid out in organizing the Canadian Wrigley Company. This item was objected to by the Larson Company on the ground that it relates mainly to cost of incorporation and is of a capital nature. In this accounting the Canadian company has been treated as an instrumentality of the Wrigley Company through which its business was carried on in Canada and this item is a proper charge against Doublemint.

Canadian Business Profits Tax.

The filed account included a claim for $1,970.75, Canadian business profits tax for 1915. Through error the company failed to include the entire tax. The item has been corrected to $3,570.74 and Doublemint should be charged to that extent.

281 Office Stationery and Circulars.

In the field account claim is made for $31,797.25 expended for office stationery and circulars. In the Reckitt report the Wrigley Company transferred a certain portion of this amount to the advertising account, thus reducing this item to $24,407.84, allowed in this report.

Miscellaneous Advertising.

Claim is made in the filed account for $723.52 for miscellaneous advertising. The Reckitt report revised this amount to $675.13 by making counter transfers of items between overhead and advertising accounts, and this figure has been accepted in this report as the correct amount.

Advances to Chicle Growers.

Claim is made for $2,240.18 on account of losses sustained on advances made to chicle growers between 1911 and the accounting period, charged off on the books of the company at December 31, 1914.

The question is whether these losses should be regarded as sustained at the time the advances were made or at the time the accounts were written off as uncollectible on the books. As a matter of bookkeeping where the owner of the business alone is interested they would probably be treated as losses accruing at the time they are charged off on the books,
282 but where a third party becomes entitled to the profits of the business the owner of the business asserting the claim should establish that the losses occurred within the accounting period. This has not been done and the claim should be disallowed.

Administration Expenses.

The Larson Company contends that the Wrigley Company should not have credit in this accounting for salaries paid to executive officers during the accounting period. No claim is made that these salaries are excessive or were fixed with a view to absorb profits. The salary of Wm. Wrigley, Jr., president, was $75,000.00 a year before and at the time the period began and remained unchanged throughout the period. Some increases were granted to other executive officers, but there is nothing to indicate that these increases were not justified by the services rendered.

The Larson Company urges that the executive officers of the company conceived and directed the wrongful infringement and that Larson should not contribute towards paying for their time and services in so doing. The Wrigley Company was managed and controlled by its directors and stockholders in all essential respects as other corporations are managed and controlled. It cannot be said to be what is
283 sometimes termed a one man corporation, nor that it was used as a cloak to cover the unlawful practices of the

individuals who conducted its affairs. Wm. Wrigley Jr. owns a larger amount of stock in the company than any other stockholder, but the aggregate holdings of the executive officers of the company are less than fifty per cent of the total stock.

The amount claimed as Doublemint's share of salaries of executive officers, $77,736.34, should be allowed.

Depreciation on Motor Trucks, etc.

In the filed account claim is made for $1,131.61 for Doublemint's portion of depreciation on motor trucks and office furniture for the period July 28th to December 31st, 1914. Through error the charge was made for the whole year instead of for the portion of the year included in the accounting period. Correcting this error reduces the item to $472.11 charged to Doublemint in this accounting.

Reapportionment of 1918 Overhead.

The Wrigley Company in the Reckitt report claims credit for $12,500.25, the result of a proposed revision of the overhead expenses for the period January 1st to November 12th, 1918, contending that the method used in the filed account 284 of taking the times actually entered on the books during that time is erroneous, that the overhead for the entire year 1918 should be ascertained and the portion belonging to the broken period January 1st to November 12th arrived at by taking that proportion of the total overhead that the broken period bears to the entire year.

This claim has been denied as the same conditions existed as to the broken period, July 28th to December 31st, 1914, and there is no evidence enabling a corresponding revision to be made for that period. It would be improper to revise the method used in arriving at overhead for the broken period at the end without making the same revision as to the broken period at the beginning.

Trade Discounts; Commissions.

Claim is made in the filed account for $80,108.53 on account of trade discounts, and for $26,284.38 on account of commissions. In the Reckitt report attention is called to the fact that an error was made in apportioning trade discounts for part of the period, that one amount was duplicated in the trade discounts and commissions and that a large amount had been entered in commissions that should have been en-

tered under trade discounts. After making the proper corrections and adjustments the Reckitt report makes claim
285 for $99,180.54 on account of trade discounts, and for $7,709.21 on account of commissions.

Trade discounts were allowed on the advertised brands only and Doublemint's share of such discounts has therefore been arrived at on the basis of Doublemint sales to total sales of advertised brands.

The figures given in the Reckitt report for trade discounts and commissions have been accepted as correct in this report.

Brooklyn Moving Expenses.

The Wrigley Company claims credit for $28,392.93 on account of what has been called "Brooklyn moving expenses".

On June 18, 1918, the Government commandeered the premises occupied by the Wrigley Company as a tenant in the Bush Terminal Building, Brooklyn, New York, and it became necessary that the Wrigley Company vacate the premises. On July 29, 1918, it purchased property with buildings thereon for which it paid $400,000.00. On September 9th, it vacated the Bush Terminal. In the meantime building operations and alterations were going forward on the new site that were
286 completed in March, 1919, though they had sufficiently progressed that the company occupied the new factory in January, 1919.

The claim is for the difference between the actual amount expended on the buildings and the reasonable value as shown by an appraisal made in 1919 by the American Appraisal Company. The Wrigley Company has filed a claim against the Government on account of damages sustained as a result of the commandeering order and that claim so far as the evidence shows has not yet been disposed of. The claim so filed covers a part only of the claim presented here, but no good reason is given why it should not cover the entire claim.

The Government cannot take private property for public use without making full recompense and the question as to the amount Wrigley shall receive is a matter to be settled between Wrigley and the Government. There is no reason why Larson should be required to litigate this question with Wrigley. The claim should be disallowed.

Taxes (other than income and excess profits).

In the filed account there was included an item representing taxes other than income and excess profits taxes. At the

287 time the filed account was made all tax bills had not been received. When the Reckitt report was presented all data was at hand and this item was refigured and a charge of $17,930.28 is now made against Doublemint. This figure has been accepted as correct in this report.

Interest Received.

The accountants on both sides dealt with miscellaneous income under the subject of overhead expenses, calling it "interest received". However, it is deemed best to handle this subject separately and nothing is included under overhead on account thereof.

SUMMARY OF OVERHEAD EXPENSES.

	Total as Allowed by Master	7/28 to 12/31/14	1915	1916	1917	1/1 to 8/24/18	8/25 to 10/4/18	10/5 to 11/12/18
Expenses regarding which there is no dispute,	$682,011.16	$ 46,761.61	$136,984.28	$155,090.18	$171,423.71	$145,868.37	$ 22,998.74	$ 3,784.17
Depreciation on Buildings,	.....	.....	.....	.....	.....	.....	.....	.....
Tax on Essential Oil,	.....	.....	.....	.....	.....	.....	.....	.....
Salaries and Expenses of Brooklyn and Toronto,	.....	.....	.....	.....	.....	.....	.....	.....
Illinois Manufacturers' Association,	4.95	.....	.....	.....	.....	.....	4.95	.....
George F. Desbien,	105.09	105.09	.....	.....	.....	.....	.....	.....
Paris Advertising,	110.05	110.05	.....	.....	.....	.....	.....	.....
Paris Office Salary and Expenses,	450.26	450.26	.....	.....	.....	.....	.....	.....
Paris Office Fixtures,	111.41	.....	.....	111.41	.....	.....	.....	.....
Refund of Misappropriations,	200.57	200.57	.....	.....	.....	.....	.....	.....
Frank F. Pulver	.....	.....	.....	.....	.....	.....	.....	.....
Cost of Alteration of Main Office,	114.19	.....	.....	66.42	73.84	40.06	11.86	2.13
Plans for Factory Additions,	.....	.....	.....	.....	.....	.....	.....	.....
Legal Fees—Canadian Company,	217.26	.....	.....	.....	217.26	.....	.....	.....
Canadian Business Profits Tax,	3,570.74	.....	.....	3,570.74	.....	.....	.....	.....
Office Stationary and Circulars	24,407.84	1,538.86	5,422.06	10,905.85	4,988.50	1,552.57	.....	.....
Miscellaneous Advertising,	675.13	49.51	190.64	180.87	119.42	134.69	.....	.....
Advances to Chicle Growers	.....	.....	.....	.....	.....	.....	.....	.....
Administration Expenses,	77,736.44	8,096.34	20,078.33	17,643.40	17,006.84	12,022.73	2,255.12	633.68
Depreciation on Motor Trucks,	472.11	472.11	.....	.....	.....	.....	.....	.....
Reapportionment of 1918 Overhead,	.....	.....	.....	.....	.....	.....	.....	.....
Trade Discounts,	99,180.54	5,586.44	22,956.39	23,448.07	26,256.34	17,260.12	3,187.09	486.09
Commissions,	7,709.21	793.25	2,770.74	3,018.27	1,197.30	70.35	.....	.....
Brooklyn Moving Expenses,	.....	.....	.....	.....	.....	.....	.....	.....
Taxes (Other than Income and Excess Profits),	17,930.28	1,039.93	3,037.29	3,367.92	4,841.70	4,638.45	881.80	123.19
Interest Received,	.....	.....	.....	.....	.....	.....	.....	.....
Fractional Difference,	.10	.....	.....	.....	.....	.....	.....	.10
	$915,506.09	$ 64,802.88	$191,439.73	$217,403.13	$226,124.91	$181,366.52	$ 29,339.56	$ 5,029.36

289 LOSS ON SALE OF MERCHANDISE WITH DOUBLEMINT

During the accounting period Wrigley, for the purpose of increasing sales, adopted the practice of making combination offers of gum and merchandise, called "drop shipment premium offers". There was a loss sustained on the merchandise furnished for this purpose of $73,190.82 which amount is not disputed by the Larson Company. Doublemint's portion thereof on the basis of Doublemint sales to total sales is $12,258.41, and credit is given to Wrigley for that amount.

Loss by Fire at Belize.

On August 17, 1918, mess pork on hand at Belize, to be furnished as supplies to chicle gatherers, of the value of $13,284.58, was destroyed by fire. Wrigley contends it should have credit in this accounting for Doublemint's portion of this loss and this contention is sustained. Doublemint's portion of the loss on the basis of Doublemint sales to total sales is $1,700.30.

As a matter of law this is a business loss and should be dealt with the same in all respects as if material on hand to be used in the course of manufacture had been destroyed by fire.

290 United Profit Sharing Coupons

Beginning in September, 1914, the Wrigley Company, to induce sales, issued with its principal advertised brands United Profit Sharing Coupons, redeemable in cash or merchandise at the premium stations of the United Profit Sharing Corporation together with coupons furnished by that corporation to other manufacturers and dealers. The coupons were printed by the United Profit Sharing Corporation, the Wrigley Company paying the cost thereof amounting to $39,585.41, of which Doublemint's share is $7,453.38.

Coupons were issued in three denominations of a value, redeemable in cash, of one-fifth cent, one cent and five cents. The one-fifth cent coupon was printed on the counterband wrapped around each five-stick package of gum. This coupon reached the consumer. The one cent coupon, known as a dealer's coupon, was packed in each box of twenty five-stick

packages. The five cent coupon was issued as a premium to jobbers' salesmen and to purchasers of the equivalent of five boxes of gum. Larson Exhibits 26, 28 and 29.

The Wrigley Company paid the United Profit Sharing Corporation for the coupons redeemed at the rate of three dollars per thousand of the one-fifth cent coupons. Out of such payments the United Profit Sharing Corporation had to
291 bear the cost of redemption whether in cash or merchandise. The Wrigley Company paid to the United Profit Sharing Corporation during the accounting period $1,834,518.10 for coupons issued and redeemed during that period. As to this amount there is no dispute. Doublemint's share thereof on the basis of coupons issued with Doublemint to all coupons issued is $332,946.71.

At the end of the accounting period there had been redeemed 26.264% of the total coupons issued. The Wrigley Company claims that the total of coupons redeemed during the accounting period and those that would be presented for redemption thereafter would equal at least fifty per cent of the coupons already issued, setting up as a contingent liability the difference between the fifty percent and the amount that had actually been paid for redemptions during the accounting period. The Larson Company claims that thirty-three and one-third percent of all issues, instead of fifty per cent, is sufficient to cover all redemptions.

The close of the accounting period marked no break or change in the method of issuing and redeeming coupons. The Wrigley Company continued to issue coupons and to redeem all coupons presented for redemption, whether issued during or after the accounting period. Had the company key-numbered its coupons issued after the close of the period, it would have been possible to ascertain how many of the coupons
292 redeemed thereafter were issued during the period. Testimony was introduced by the Wrigley Company as to the experience of other concerns in the redemption of coupons, but owing to the difference in the commodities with which the coupons were given and in the manner and conditions under which they were issued and redeemed, the experience of one concern issuing coupons is of little value in determining what the experience of another concern would be.

Because of the confusion resulting from the manner in which the coupon business was carried on by Wrigley and the inherent uncertainty and confusion in the coupon system

itself, it is impossible to fix with reasonable accuracy a percentage of issues to cover redemptions, and any opinion in that respect is necessarily based on conjecture. Larson concedes in effect that thirty-three and one-third per cent of the coupons issued will finally be presented for redemption and that percentage has been accepted in this account. On this basis $2,305,318.75 should have been set aside to provide for redemptions. As $1,834,518.10 was paid for redemptions during the accounting period, it leaves $470,800.65 to provide for redemptions after the period. Doublemint's share thereof on the basis of coupons issued with Doublemint to all coupons issued is $98,519.06.

293 Depreciation on Patents and Patent Rights

The Wrigley Company in its filed account asks credit for $64,267.43, Doublemint's portion of depreciation or amortization of patents and patent rights, relating principally to sheeting and wrapping machines, valued at $1,500,000.00 and written off at the rate of one-seventeenth each year.

Depreciation on property is an item to be considered in accounting cases. The question arising in this case is whether the value fixed upon patents and patent rights has been proven with that clearness and precision required in judicial proceedings. It is not established by appraisal, by money price paid therefor, or by other competent evidence.

At the time of the merger the West Virginia Company issued to the Illinois Wrigley Company in payment for its tangible assets preferred stock of the par value of $750,000.00, and for its intangibles common stock of the par value of $5,000,000.00; to the Zeno Company for its tangible assets preferred stock of the par value of $750,000.00 and for its intangibles, including patents and patent rights, good will, etc., common stock of the par value of $2,500,000.00. All in-
294 tangibles were carried on the books of the Wrigley Company in one account at a valuation of $7,500,000.00, being the par value of the total common stock issued, from the time of the merger until after the close of the accounting period. In December, 1918, for the purpose of arriving at values to be used in computing income and excess profits taxes, the Government after conferences with representatives of the Wrigley Company assigned to patents and patent rights a value of $1,500,000.00, and thereafter the Wrigley Company

carried patents and patent rights in a separate account on its books at a valuation of $1,500,000.00, and that figure has ever since been treated by the Government as the value of Wrigley's patents and patent rights for taxing purposes.

The assigning of a definite value to property for taxation purposes by a governmental body should not be binding upon a third party who was not represented. The value of patents, patent rights and other intangibles acquired from the Zeno Company as fixed by the issue of $2,500,000.00 of common stock in the merger proceedings is not of great weight in establishing actual value; it is a matter of little conse-
295 quence what value was fixed on the property for which common stock was issued so long as relative values were maintained on the properties of the two merging companies. The fact that the common stock in question sold at par is without probative force as it is impossible to determine to what causes the selling value of the stock may have been done.

An effort was made to establish the value of patents by proving the superiority in use of the machines made under the patents over machinery open to Larson and other manufacturers. The evidence was excluded as too speculative and conjectural to be relied upon in judicial proceedings.

The failure to establish value with reasonable certainty prevents the allowance of a credit to Wrigley on account of depreciation on patents and patent rights.

296 Miscellaneous Income

During the accounting period the Wrigley Company received miscellaneous income amounting to $349,804.89 on account of interest and dividends received on bank balances, loans and investments in bonds and stocks, and in this accounting Wrigley gave credit to Doublemint on a sales basis for Doublemint's portion of such income resulting from assets considered by Wrigley as forming part of the invested capital used in the gum business, but did not account for the income from investments not so considered.

Profits were realized on the Doublemint business during every year covered in whole or in part by the accounting period on the theories adopted in this report. These profits were retained by Wrigley and were inseparably commingled with its other funds. Doublemint should have credit for its share of any income arising from the investment of such funds, whether considered as invested in the gum business or

otherwise, and in this report the total miscellaneous income has been allocated in the proportion that the accumulated profits of Doublemint at the first of each calendar year bear to the total invested capital, excluding intangibles, the accumulated Doublemint profits being considered as Doublemint's investment in the business.

297 Federal Taxes.

Credit was claimed by the Wrigley Company in the filed account, as corrected in the Reckitt report, for $621,108.97, Doublemint's portion of income and excess profits taxes for the years 1917 and 1918, arrived at on the theory that Doublemint profits were the last to be made and should therefore bear the highest rate of tax. The result of this theory is to make the profits on Wrigley's other business bear a lower rate than Doublemint. Obviously this was an improper method and it was later along so conceded. Had Doublemint's share of federal taxes been arrived at in the proportion that Doublemint profits shown in the Reckitt report are of total profits, the charge would have been $372,942.09.

The federal taxes paid by Wrigley for the years 1917 and 1918, the years in which it concedes profits were made on Doublemint, were paid pending this litigation and with knowledge of Larson's claim. The Court of Appeals on July 30, 1918, handed down its decision directing that a decree be entered granting an injunction and awarding to Larson the profits made on the Doublemint business. Presumably at that time Wrigley had paid the federal taxes levied for the
298 year 1917, but before it paid the taxes for 1918 the decree awarding profits to Larson had been entered, the case referred to the master and Wrigley had filed its account under federal equity rule 63 and had full knowledge of Larson's rights and of Wrigley's liability to pay to Larson the profits on Doublemint. The profits had at that time been ascertained by Wrigley and no uncertainty remained that Wrigley would be required to pay at least the profits shown in the filed account. It does not appear that when Wrigley paid its taxes for 1917 or 1918 it notified the Government of the pendency of this suit, or that since the decree was entered it at any time informed the Government of the terms and provisions of the decree or took any other protecting steps in its own behalf.

The Wrigley Company now asks that the Larson Company be placed back to the time when Wrigley paid its federal taxes

for the years 1917 and 1918 and be required to extend credit in this accounting to Wrigley for the amount of taxes Larson would have been required to pay if the profits had been turned over to it at that time. The law compels Larson to pay taxes on the profit fund that shall finally come into its hands, and if it shall be charged in this accounting with taxes paid by Wrigley, it will be subjected to double taxation.

299 Under the law, when the Wrigley Company pays the profit fund over to Larson, it may in computing its federal taxes deduct such payment as a current loss from the profits made that year, and if necessary, from the profits made in the succeeding year, and the evidence indicates that the profits for the two years will be ample for that purpose.

If the rates of taxation in force in 1917 and 1918 in regard to federal taxes had remained unchanged, no serious question would have arisen. Substantial justice would have been dispensed by the provision of the law requiring Larson to pay a tax and allowing Wrigley a refund. The situation is complicated by the fact that after Wrigley paid the taxes for which it seeks credit Congress reduced taxes. The effect of the law, if it shall remain unchanged will be to decrease the amount Larson will be required to pay when it shall receive the profit award and also to reduce the amount that will be refunded to Wrigley. However, the present law may be changed and be materially different when the time comes for applying it to the conditions in this case. Neither side has a vested interest in the law, but must be governed by the law as it exists at the time. A court of equity may in its discretion relieve hardships resulting from changes in the law, but the facts in this case do not call for a dispensation of that kind.

300 In reaching conclusions the case of *Sly v. Pangborn*, 276 Federal 971, affirmed in 284 Federal 271, has not been overlooked. The court in that case allowed federal taxes as an expense and in the decree sought to adjust the equities between the parties by providing for conditions that might or might not arise in the future. An ordinary patent infringement was dealt with and there is nothing to indicate evil intent on the part of the infringer. Such a case is not comparable with a case where the motive and conduct of the infringement are such as described by the Court of Appeals of this Circuit on both occasions when this case was before that court.

The Wrigley Company is not entitled to the credit for

which it makes claim. It must settle its tax matters with the Government with which it has dealt, and Larson should have the right to settle its tax matters with the Government. A decree such as was entered in the Sly case would open the door to further litigation between the parties. This should not be encouraged. If the Wrigley Company as a result of changes that have been made in the law is entitled to relief, it must obtain that relief from the Government, and if necessary, courts of equity are open for that purpose.

301 Interest on Invested Capital.

The Wrigley Company requests that it be allowed in this accounting interest on invested capital at the rate of seven per cent. per annum. The elements making up invested capital upon which it claims interest should be reckoned are: (1) net investment in tangible assets; (2) investment in patents and patent rights; (3) investment in good will.

The items making up the investment in tangible assets would have to be recast before an amount could be arrived at on which in a proper case interest on invested capital might be computed, but as Wrigley's request has not been granted and nothing on account of interest on invested capital has been allowed, it is unnecessary to go into details.

The decree awards to Larson all gains and profits of Wrigley accruing from the manufacture and sale of its Doublemint gum in the infringing dress. Interest on invested capital does not enter into manufacturing or selling cost and is not money paid out or received by the infringer during the period. It has been allowed in patent infringement accounting cases as a deduction from profits, but the question of its allowance in unfair competition cases has not been passed upon. The court directs that the profits be awarded to Larson and does not authorize any deduction to be made therefrom. *Larson* v. *Wrigley*, 253 Fed. 914; 275 Fed. 535.

302

Summary of Profits derived from Manufacture and Sale of Doublemint during the Accounting Period.

	7/28 to 12/31/14	1915	1916	1917	1/1 to 8/24/18	8/25 to 10/4/18	10/5 to 11/12/18	Total
Sales,	$ 570,426.40	$1,816,332.08	$2,049,964.85	$2,348,003.49	$1,772,376.02	$ 316,269.31	$ 43,914.75	$8,917,286.90
Manufacturing Cost,	238,623.67	788,715.00	885,984.13	980,825.65	699,848.69	147,042.08	23,558.36	3,764,597.58
—Gross Profit—	$ 331,802.73	$1,027,617.08	$1,163,980.72	$1,367,177.84	$1,072,527.33	$ 169,227.23	$ 20,356.39	$5,152,689.32
Deductions from Gross Profits:								
Advertising	$ 133,668.54	$ 301,265.09	$ 217,240.86	$ 180,562.32	$ 163,390.64	*	*	$ 996,127.45
Overhead Expenses,	64,802.88	191,439.73	$ 217,403.13	226,124.91	181,366.52	$ 29,339.56	$ 5,029.36	915,506.09
Loss of Sale of Merchandise with Doublemint,	.....	4,303.06	10,702.86	6,063.10	7,092.06	1,718.55	.....	12,258.41
Loss by Fire at Belize,	.....	.....	.....	.....	1,700.30	.....	.....	1,700.30
Printing United Profit Sharing Coupons,	1,336.31	1,172.91	1,194.72	2,250.37	1,435.61	63.46	.....	7,453.38
Amount paid for redemption of United Profit Sharing Coupons,	1,341.87	48,454.81	98,487.84	105,450.17	65,858.76	13,353.26	.....	332,946.71
Contingent Liability for Unredeemed United Profit Sharing Coupons,	28,900.86	43,082.15	6,595.06	6,634.05	14,012.22	705.28	.....	98,519.06
Miscellaneous Income,	.....	263.31	5,027.35	8,746.40	50,912.21	3,565.20	3,391.27	71,905.74
—Total—	$ 230,050.46	$ 589,454.44	$ 546,597.12	$ 518,338.52	$ 369,759.78	$ 36,767.25	$ 1,638.09	$2,292,605.66
Net Profit on Doublemint,	$ 101,752.27	$ 438,162.64	$ 617,383.60	$ 848,839.32	$ 702,767.55	$ 132,459.98	$ 18,718.30	$2,860,083.66

*Advertising for 1918 has all been charged in the first period of that year, but has been apportioned on the ratio of Doublemint Sales to Total Sales of all advertised brands during the period from January 1st to November 12th, 1918.

M.M.2

303 **Good Will**

The Wrigley Company and its predecessors through a long and successful business course had built up a valuable good will when the accounting period began. The Larson Company contends that as good will was enhanced in value during the period, it is entitled under the decree awarding gains and profits to Doublemint's portion of the increase in such value.

Whether Larson is entitled to credit on this account depends upon whether under the theories adopted in this report the Wrigley Company is left with a good will value to which Doublemint in any wise contributed.

To establish and maintain good will requires that the organization be of a high order and likely to continue; the product dealt in must be of good quality and of a kind for which there is a fairly constant demand; and a judicious course of advertising must be maintained.

The Doublemint business had nothing to do with establishing the organization or with the quality of the gum produced. By the method adopted in eliminating institutional advertising no charge has been made against Doublemint on account of institutional advertising contributing to good will, and by the adoption of the sales method to divide advertising among the brands Larson has been compensated, and Wrigley has been caused to pay, for the value created in the name "Doublemint".

304 **Interest on Award**

It is a well settled practice and may be said to be the rule that a plaintiff in an accounting case is entitled to interest on the fund awarded to it. The allowance of interest in accounting cases is not an inflexible rule or based on statutory enactment. It is a doctrine adopted by courts of equity and applied when necessary to accomplish fair and just results between the parties. The question as to whether interest shall be allowed at all, and if so, the rate at which it shall be computed, and the time from which it shall begin to run, lies in the sound discretion of the court, to be exercised in accordance with the facts of the particular case.

Interest has usually been allowed from the date of the filing of the master's report, but in cases where the question of the time has been a master of controversy the courts

have fixed the time deemed to be fair and equitable in the facts and circumstances of the case before it, and courts in reaching conclusions in this respect have taken into account the nature and character of the infringement, the conduct of the infringer and its motives and purposes in pursuing its unlawful conduct.

305 A portion of the Doublemint profits earned furing the accounting period was invested and the income arising therefrom has been allowed as a credit to Larson in this report under miscellaneous income. It must be assumed that the remainder of such profits was used as a working capital in carrying on the Doublemint business and Larson has received the benefit derived from such use through increased profits. From the close of the accounting period to the present time Wrigley has retained the profits and used them in its business and received the benefits therefrom in all respects the same as if the profits belonged to it, and during this time Larson has ben deprived of any benefit from the use of such profits.

After the decree had been entered awarding the profits made on Doublemint to Larson Wrigley wrongfully took the position that no profits were made on Doublemint, that, therefore, Larson was not entitled to any award at all, and has ever since steadfastly sought to maintain that position. It would be inequitable for Wrigley to take Larson's profits and use them while the litigation proceeded without paying interest thereon, and it is recommended that interest at the rate of six per cent be allowed on the amount found to

306 be due Larson in this report, $2,860,083.66, from the end of the accounting period, November 12, 1918, to the time of the entry of final decree herein.

It may be said that the amount due was not liquidated at the end of the accounting period, but if that fact prevents the running of interest, no award would draw interest until it has been established by the decision of the last court to which it may be taken, as the master's report when filed does not amount to a liquidation. It is at best but a recommendation. A court of equity in the exercise of sound discretion may allow interest on unliquidated sums or damages in any case where in the facts justice and equity so require. In the exercise of its powers a court, when necessary to do justice, will apply the equitable doctrine that that is certain which is capable of being made certain and allow interest on funds from the time when in fairness and

justice interest should be computed though the exact amount of such funds is not ascertained until a later date.

307 Claim for Division Because of Legend

A large portion of the Doublemint gum sold during the accounting period was wrapped in counterbands bearing the legend:

"Made by the manufacturers
of the famous
Wrigley's Spearmint
Wm Wrigley Jr Co.
Chicago New York
Toronto Lond."

The Wrigley Company contends that the sales of gum so wrapped should be excluded from this accounting on the ground that notice was given to the purchaser that he was getting Wrigley's, and not Larson's, gum.

This claim is not allowable. The decree requires the master to award to Larson all profits on Doublemint sold in the infringing dress and he is not authorized to make any deductions therefrom. *Larson* v. *Wrigley*, 275 Federal 535.

Canadian and Australian Corporations

The Wrigley Company had business organizations in Canada and Australia and a factory in Toronto, Canada. All sales made in these countries up to January 1, 1916, were reported separately in the filed account under protest
308 the foreign sales should not be included.

Early in January, 1916, the business in Canada was incorporated under the name "Wm. Wrigley Jr. Company, Limited" and the business in Australia under the name "Wm. Wrigley Jr. Company Proprietary Limited". The business done through these two corporations was not reported in the filed account and the Larson Company objected an account thereof and asked that an order be entered directing the Wrigley Company to file a statement of account under equity rule 63 covering such business. The Wrigley Company objected that these foreign corporations were separate entities and not included in the decree. The master stated that before passing upon the question the testimony on both sides should be introduced as to the relations existing between the Wrigley Company, West Virginia corporation, and these foreign corporations, and thereafter testimony was introduced on both sides, but the matter was not concluded

until after the decision of the Court of Appeals on the question of the Larson Company's right to profits made in territory where competition did not exist. Arguments were made on the question, and on October 17, 1921, an order was entered directing the Wrigley Company, West Virginia corporation, to file statements of account covering the business of the Canadian and Australian corporations.

309 The account of the Canadian business was filed April 21, 1922, and of the Australian business July 6, 1922. Touche, Niven & Company, Larson's accountants, made an examination of the books and records of the Canadian corporation, but no report of such examination has been presented to the master and no evidence has been introduced on either side on the question of the business done or profits made through the Canadian and Australian corporations.

The business of these foreign corporations was carried on separately, they were not made parties to this suit, and the question as to whether their business should be included has been a matter of contest from the beginning of this accounting. Shortly after the order was entered directing the filing of the accounts a question arose as to the manner in which such accounts should be handled by the master in making his report. After argument the master announced that it was his intention to make separate findings or separate reports as to the business covered by the filed account and the business done through the foreign corporations, that neither should delay the other (Trans. 2880) and this position, as the master understood, was acquiesced in and was thereafter acted upon until near the close of the case when objection was made to the master's filing separate records. No harm can come from treating the business done through the foreign corporations separately and great delay would otherwise result.

310 Compensation of Accountants

James Hall, the impartial accountant, on July 27, 1923, filed a statement showing the services rendered by him and the amount charged therefor, $7,359.50, crediting Larson with the payment of $5,127.00, leaving a balance due of $2,232.50. Exhibit: Hall Statement. The services rendered by Hall were proper and necessary and the charge made therefor is fair and reasonable and has been approved by both sides. $7,359.50 should be taxed as costs in the case

and paid by the Wrigley Company, $5,127.00 to the Larson Company and $2,232.50 to James Hall, and these amounts should draw interest at the rate of six per cent. per annum from the date of filing the master's report.

Touche, Niven & Company, employed by the Larson Company as its accountants in this case, on September 21, 1923, filed with the master a statement showing services rendered by it amounting to $26,062.66, and on October 12, 1923, filed a supplemental statement showing further services amounting to $1,140.00, a total of $27,202.66. Exhibit: Touche-Niven Statement A and Touche-Niven Statement B. Included in the September 21st statement is a charge of $9,611.41 for services rendered in connection with the accounts filed by the Canadian and Australian corporations which should be excluded from present consideration, leaving a charge of $17,591.21 to be here considered.

311

The services were rendered as claimed and the amount charged therefor is a fair and reasonable amount, and this is not in dispute, but the Wrigley Company takes the position that the question as to who shall pay compensation of accounts is not a proper subject of inquiry for the master.

The account filed by Wrigley under equity rule 63 did not properly state the results of the business. It showed a heavy loss on Doublemint which aroused question in view of the well known fact that the Wrigley Company had made large profits on its business as a whole. The business was carried on as an entirety and the books were not kept with a view to separate profits and losses, and in order to obtain the profits and losses on Doublemint, it was necessary to resort to apportionments, percentages, and other methods by which approximately accurate results could be reached. This required the work of competent and skillful accountants. Touche, Niven & Company was competent to do the work and was not objected to by the Wrigley Company. It performed the services for which it has charged in a skillful and proper manner.

The Larson Company has paid or become obligated to pay Touche, Niven & Company the amount of its bill, $17,591.21, and it is recommended that the Wrigley Company be required to pay this amount to the Larson Company with interest thereon at the rate of six per cent from the filing of this report.

312 Objections

The undersigned further reports that on the 13th day of October, 1923, he mailed to counsel for the parties a copy of his draft report together with notice that objections might be filed thereto, and on November 1, 1923, the Wrigley Company filed objections numbered 1 to 128 inclusive. No objections were filed by the Larson Company.

The objections filed by the Wrigley Company have been considered by the master and are hereby overruled and the master stands by his report.

Return of Evidence

The master herewith returns and files with the clerk of said court a true and correct transcript of the evidence and proceedings had and taken before him consisting of 7692 pages, bound in sixteen volumes. There are also returned the objections to the Master's report filed by the Wrigley Company, marked "Objection Exhibit A"; the bills for services rendered by accountants, mentioned on page 55 of the report, marked "Exhibit: Hall Statement" and "Exhibits: Touche-Niven Statements A. and B"; the account filed under equity rule 63, marked "Wrigley Company's Account: Parts 1, 2 and 3"; the report filed by James Hall, marked
313 "James Hall Report"; the Burt & Company statement, marked "Exhibit Burt Statement"; the Touche-Niven report, marked "Larson Exhibit 132"; and the Reckitt report, marked "Wrigley Exhibit 92: Benington 1".

A great many exhibits were offered in evidence before the master. Some of them were copied in the transcript and not left with the master, some were both copied in the transcript and left with the master, some were left with the master and not copied, and some were retained in the custody of the parties. The following table shows the disposition of all exhibits.

	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
	—	A	—	—
	—	B	—	—
Buck	—	C	—	—
Exhibit	—	D	—	—
	—	E	—	—
	—	F	—	—
	—	G	—	—
	—	H	—	—
	—	I	—	—
	—	J	—	—
	—	K	—	—
	—	L	—	—
	—	M	—	—
Touche				
Exhibit	—	—	1)	Retained in custody of
	—	—	2)	Touche, Niven & Co.
	—	3	—	
	—	4	—	

Touche Exhibit	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
	—	—	—	5
	—	—	—	6
	—	7	—	—
	—	—	—	8
	—	9	—	—
	—	—	—	10 to
	—	—	—	21, incl.
	—	22	—	—
	—	—	—	23
	—	24-A to	—	—
	—	24-F incl.	—	—
	—	25-A	—	—
	—	25-B	—	—
	—	26	—	—
	—	26-A to	—	—
	—	26-F incl.	—	—
Larson				
Exhibit	—	1	—	—
	—	2	—	—
	—	3	—	—
	4 to	—	—	—
	9 incl.	—	—	—
	—	10 to	—	—
	—	13 incl.	—	—
	14	14	—	—
	15	15	—	—
	16	16	—	—
	17	17	—	—
	—	18 to	—	—

—	20 incl.	—	—
—	21-A to	—	—
—	21-J. incl.	—	—
—	22-A to	—	—
—	22-F incl.	—	—
—	23	—	—
—	24	—	—
—	25-A	—	—
—	25-B	—	—

—59—

315 Larson Exhibit	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
	—	26 to	—	—
	—	29 incl.	—	—
	—	—	30)	By stipulation retained
	—	—	31)	in custody of Wrigley
	—	—	32)	Company, to be pro-
	—	—	33)	duced at request of
	—	—	34)	either party or the
	—	—	35)	court
	—	37 to	36)	
	—	53 incl.	—	—
	—	—	—	—
	54	—	—	—
	55	56 to	—	—
	—	71 incl.	—	—
	—	—	—	—
	—	—	—	72
	—	74 to	—	73
	—	81 incl.	—	—
	—	—	—	—
	—	—	82)	(retained in custody of
	—	83		Larson Company)
	—	—	—	—
	—	85 to	—	84
	—	91 incl.	—	—
	—	—	—	—
	—	93	—	92
	—	94	—	—
	94	—	—	—
	—	96 to	—	95
	96 to	101 incl.	—	—
	101 incl.	—	—	—
	—	—	—	102 to
	—	110 to	—	109 incl.
	—	113 incl.	—	—
	—		—	—

—60—

316

	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
Larson Exhibit:	—	—	—	114
	—	115 to	—	—
	—	120 incl.	—	—
	121	121	—	—
	122	122	—	—
	—	123	—	—
	—	124	—	—
	—	—	—	125
	126	126	—	—
	—	—	—	127
	—	128	—	
	—	—	—	129
	130	130	—	—
	—	—	—	131
	132 to	—	—	—
	137 incl.	—	—	—
	138 to	138 to	—	—
	141 incl.	141 incl.	—	—
	—	142 to	—	—
	—	144 incl.	—	—
	145	145	—	—
	145-A	145-A	—	—
	146	146	—	—
	147, sh. 1	147, sh. 1	—	147, sh. 2, 3, 4,
	148, sh. 1,	148, sh. 1,	—	148, sheets 2,
	3, 5, 7 & 8	3, 5, 7 & 8	—	4, 6 & 9.
	—	—	—	149
	—	—	—	150
	151	151	—	—
	152	—	—	—
	—	153	—	—
	—	—	—	154
	155	—	—	—
	—	156	—	—
	—	157	—	—
	158 to	—	—	—
	173 incl.	—	—	—
	—	—	—	174 to
	—	—	—	184 incl.
	185 to	—	—	—
	188 incl.	—	—	—
	—	189	—	—
	—	190	—	—
	191	—	—	—
	192	—	—	—
	—	193	—	—
	—	194	—	—
	—	—	—	—
	196	196	—	—
				(no number 195 given)

317

	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
Larson Exhibit:	—	—	—	197
	198	—	—	—
Wrigley Exhibit:	—	1 to	—	—
	—	9 incl.	—	—
	10	10	—	—
	—	11	—	—
	—	12-A	—	—
	—	12-B	—	—
	13	—	—	—
	14	—	—	—
	15-A	15-A	—	—
	15-B	15-B	—	—
	16 to	16 to	—	—
	20 incl.	20 incl.	—	—
	—	—	—	21 (offered and
	22 to	22 to	—	— withdrawn)
	35 incl.	35 incl.	—	—
	36	36, pp. 18 & 19	—	—
	37	37, p. 1	—	—
	38	38 front p. & p. 1	—	—
	39 to	39 to	—	—
	42 incl.	42 incl.	—	—
	43	—	—	—
	—	44 to	—	—
	—	50 incl.	—	—
	51	—	—	—
Wrigley Exhibit 52		KIRKMAN NO.		
	1	1	—	—
	2	2	—	—
	3	3	—	—
	4 to	—	—	—
	6 incl.	—	—	—
	7 to	—	—	—
	18 incl.	—	—	—

318

	Returned herewith	Copied or bound in transcript
Wrigley Ex. 52:	KIRKMAN NO.	
	19	19
	20 to	—
	27 incl.	—
	28	28
	29 to	—
	37 incl.	—
Wrigley Ex. 53:	BORDEN NO.	
	1 to	1 to
	7 incl.	7 incl.
	8	—
Wrigley Ex. 54:	BECTON NO.	
	1	1
	2	2
	—	3
	—	4
Wrigley Ex. No.	55	55
	56	56
	57	57
	—	58-A
	—	58-B
	59	59
	60	60
	61	—
	62	—
Wrigley Ex. 63:	ATWOOD NO.	
	1 to	1 to
	7 incl.	7 incl.

319

	Returned herewith	Copied or bound in transcript	Retained by parties
Wrigley Exhibit 64:		BUCK NO.	
	1 to 6 incl.	—	—
	—	—	—
	—	7	—
	—	8	—
	9 to 13 incl.	—	—
	—	—	—
	—	14	—
	—	15	—
	16	—	—
	—	17 to 32 incl.	—
	—	—	—
	33 to 42 incl.	—	—
	—	43 to 55 incl.	—
	—	—	—
	56-A	—	—
	56-B	—	—
	56-C	—	—
	57 to 60 incl.	—	—
	—	61 to 63 incl.	—
	—	—	—
	64	—	—
	*65	—	—

*This exhibit contains copies of Wrigley Ex. 64: Buck Nos. 1 to 56-C inclusive.

Wrigley Exhibit 65:		STANLEY NO.	
	1 to 20 incl.	—	—
	—	—	21 to 29 inclusive retained in custody of Wrigley Co. by stipulation.
	—	—	
	—	—	
	—	—	
	—	—	

320

	Returned herewith	Copied or bound in transcript	Retained by parties
Wrigley Exhibit 65:		STANLEY NO.	
	—	30	—
	31 to	31 to	—
	33 incl.	33 incl.	—
Wrigley Exhibit No.	66	—	—
	67	—	—
	—	68	—
Wrigley Exhibit 69:	1 to	1 to	—
	3 incl.	3 incl.	—
Wrigley Exhibit 70 Emerich No.	1	—	—
Wrigley Exhibit 71 Stanley No.	1	—	—
Wrigley Exhibit No.:	—	72 to	—
	—	90 incl.	—
	91	91	—
Wrigley Exhibit 92:		BENINGTON NO.	
	1 to	—	—
	21 incl.	—	—
Wrigley Exhibit No.:	—	93	—
	—	94	—
	95	95	—
	96	—	—
	—	97	—
	—	98	—
	—	99	—

321

	Returned herewith	Copied or bound in transcript	Retained by parties	Marked for ident. only (not returned)
Wrigley Exhibit	100	100	—	—
	101	101	—	—
	—	102	—	—
	—	102-A	—	—
	—	103	—	—
	104	—	—	—
	—	105	—	—
	106	—	—	—
	107	107	—	—
	108	—	—	—
	—	—	109 z	—
Aldrich Exhibit	—	—	—	1
	—	—	—	2
	—	—	—	3

z The Wrigley Company offered the witness Stanley's working papers in evidence as Wrigley Exhibit 109. They were objected to as immaterial and irrelevant. No ruling was made by the master at that time. Trans. 7674-5. These papers are voluminous and are not in the master's custody but are in the custody of the Wrigley Company subject to the order of the court.

Compensation of Master's Office

As the case progressed before the master the parties made payments from time to time on account of his compensation. At or about the time the hearings ended before the master Larson had paid $2,725.00 and Wrigley had paid $4,550.00,
322 and at that time it was agreed between the parties and the master should receive $10,000.00 additional compensation to cover services rendered and not included in the above figures and also to cover the time spent in hearing arguments, considering the case and formulating his report, and that each party should pay one-half of the $10,000.00. Later along and before the draft report was completed each side paid the master $5,000.00, making the total amount paid by Larson $7,725.00 and by Wrigley $9,550.00, a total of $17,275.00.

The reporter took and transcribed 7,692 pages of testimony and prepared an index of 87 pages and is entitled to an attendance fee for a portion of the time. As the case progressed payments were made to her as follows: $1,986.50 by Larson and $3,103.50 by Wrigley, a total of $5,090.00. The amounts charged by the reporter were the reasonable and

customary charges for the work performed and were satisfactory to the parties.

If the compensation received by the master and by the reporter meets the approval of the court, it should be taxed as costs in the case.

Respectfully submitted,
(Signed) C. B. MORRISON,
Master in Chancery.

323 And on to-wit: the 13th day of November, A. D. 1923, there was filed in the Clerk's office of said court a certain Objections and Exceptions to Master's Draft Report, in words and figures following to-wit: Objections and Exceptions to Master's Report, filed Nov. 13, 1923.

(Endorsed) Filed No. 13, 1923 John H. R. Jamar Clerk.

324 OBJECTION EX. A.

* * * * * *

No. 488

WM. WRIGLEY JR. COMPANY'S SUGGESTIONS, OBJECTIONS, REQUESTS AND EXCEPTIONS TO THE DRAFT REPORT SUBMITTED BY THE MASTER HEREIN.

The Wm. Wrigley Jr. Company, plaintiff and defendant to counterclaim, submits the following suggestions, objections, requests and exceptions to the draft report of the Master herein.

Suggestions, objections, requests and exceptions concerning the report.

1.

We respectfully request that the Master state and find in his report:—

(1) That the Larson Company in the accounting proceedings before the Master has made no attempt to prove, nor is there any testimony to show, that any of the gains or profits of the Wrigley Company made in connection with its manufacture and sale of Doublemint gum during the accounting

period, accrued or arose from the use of the enjoined dress; or that it was impossible or impracticable to separate or
325 apportion the profits arising out of the use of this enjoined dress by the Wrigley Company from the profits which arose otherwise, or from the manufacture and sale of that gum if otherwise dressed; and that the burden was upon the Larson Company to make such proof before any recovery can be had; and we object and except to the report of the Master, and each part thereof, on account of this failure to so find.

(2) That the Larson Company in the accounting proceedings before the Master has made no attempt to prove, nor is there any testimony to show, that any sale of Wrigley's Doublemint gum during the accounting period was ever made to purchasers who were misled into buying Wrigley's Doublemint gum as or for Larson's Wintermint gum, or that there was any likelihood of any such purchasers being so misled; or that the Larson Company lost any sales or profits, or that the Wrigley Company derived any profits because of any purchasers, immediate, intermediate or ultimate, buying Wrigley's Doublemint gum as or for Larson's Wintermint gum; and that the burden was on the Larson Company to so show in order to recover any of the Wrigley Company's profits under the decree herein; and we object and except to the report of the Master, and each part thereof, on account of his failure to so find.

(3) That the Wrigley Company has at all times, conspicuously and consistently, during the entire accounting period, by its advertising, by marking its individual sticks, packages containing five sticks, and boxes in which to ship its Don-
326 blemint gum, with its own name, Wm. Wrigley Jr. Company, and generally with its own name as manufacturer thereof, so distinguished its Doublemint gum that all purchasers thereof could easily distinguish this product as the product of the Wm. Wrigley Jr. Company; and that there was no likelihood of any purchaser buying Wrigley's Doublemint gum so marked and advertised, as the product of the L. P. Larson Jr. Company; and that the Wrigley Company derived no profits or gains because of the enjoined dress; and we object and except to the report of the Master, and each part thereof, on account of his failure to so find.

A. R. 7068-69; 6857-6881 (Wrigley Exhibits 72-90, inclusive); 6882-6887; 7070; 7072; 7076; 7083-7091; 7093; 7097, 7099; 7105-7110; 7111-7131; 7094; 2247-2248.

2.

We respectfully request that the Master state and find in his report—

(1) That the Wrigley Company offered to prove; (by competent witness having knowledge of the facts, and with the admission of Larson Company's counsel that each of such witnesses might be considered as present in court for this purpose. A. R. 7106). (The Master refused to receive any of such testimony. A. R. 7073-5.)

(a) That none of the purchasers, immediate, intermediate or ultimate, of Wrigley's Doublemint gum during the accounting period were misled or deceived in purchasing Wrigley's Doublemint gum, but purchased Wrigley's Doublemint gum because each of them desired and preferred (A. R. 7104) this product of the Wm. Wrigley Jr. Company; and that the Wrigley Company has never palmed off nor attempted to palm off, nor have any purchasers bought any of Wrigley's Doublemint gum as or for Larson's Wintermint gum, or
327 any product of the Larson Company; and we object and except to the report of the Master, and each part thereof, for failure to so find and because of his refusal to receive this testimony and each part thereof.

A. R. 6884-6887; 7069; 7066-7118; 7104; 7105-6; 7107; 7108-9; 7110; 7113; 7114; 7116; 7118-7130, et seq.; 6807; 7094; 6881; 7034-7037;

(b) That the Larson Company and its Wintermint gum were each unknown in Canada, Australia and all countries foreign to the United States and in most places in the United States where Wrigley's Doublemint gum was sold during the accounting period that the territory occupied by the Larson Company in the sale of its Wintermint gum, and that of the Wrigley Company in the sale of its Doublemint gum, was largely non-competitive; that the selling price charged by the Wrigley Company for its Doublemint gum was never less, but generally more than the price charged by the Larson Company for its Wintermint gum; that substantially all Wrigley's Doublemint gum sold during the accounting period was in territory where Larson's Wintermint gum was unknown and had never been sold; that none of the sales by the Wrigley Company or any of its jobbers, dealers or users, was made with the intent, desire, design or purpose of forestalling the L. P. Larson Jr. Company, or the sale of its Winter-

mint gum; that neither L. P. Larson, Jr., nor the L. P. Larson Jr. Company had the means, credit, facilities or ability to have procured supplies to do more business than they did, or to have sold Wintermint gum throughout any substantial portion of the territory in which the Wrigley Company sold its Doublemint gum, or to have filled orders for Wintermint gum in the quantities that the Wrigley Company sold its Doublemint gum during the accounting period; that the Larson Company made no attempt to sell its Wintermint gum previous to or during the accounting period in any substantial amount or proportion of the territory where Wrigley's Doublemint gum was sold; and we object and except to the report of the Master, and each part thereof, for failure to so state and because of his refusal to receive this testimony and each part thereof.

A. R. 7075; 7091; 7099; 7106; 7108-9; 7110; 7111; 7112; 7113; 7114; 7115; 7116; 7118-7130; 7057-7063.

(c) The exact territory in which the Wrigley Company, its jobbers, retailers and dealers, sold Wrigley's Doublemint gum during the accounting period, and the exact territory where the Larson Company sold its Wintermint gum or did any other business at all times previous to and during
328 the accounting period, and when each of them commenced the sale of their products and the exact place and extent thereof; and we object and except to the report of the Master for failure to so find and because of his refusal to receive this testimony and each part thereof.

(A. P. 7091; 7092; 7094; 7099; 7105; 7106, *et seq.;* 7112; 7114; Wrigley Exhibits 72-90; 7115; 7118-7130; 7083-7091; 1808; 1814; 2100; Wrigley Exh. 101 refused (7088).

(d) We also request that the Master state and find that he would have received and considered this offered and rejected testimony of the Wrigley Company if he had not interpreted the opinion of the Court of Appeals (275 Fed. 535) as holding that the decree in this case entitled the Larson Company to an award of all the gains and profits of the Wm. Wrigley Jr. Company arising from the manufacture and sale of its Doublemint gum during the accounting period, and for that reason only be declined to receive evidence tending in any wise to diminish the total profits received by the Wrigley Company from the sale of its Doublemint gum, regardless of whether such sales, or any of them, were induced to any extent by confusion in the minds of the purchasing public, between Larson's Wintermint gum and Wrigley's

Doublemint gum, and regardless of whether the Wrigley Company's sales were made to purchasers desiring the Wrigley Company's product and not that of the Larson Company (A. R. 7075).

We object and except to the report of the Master because of his declining to receive such testimony as aforesaid, and each part thereof, and because of his failure to state and find as aforesaid, and every part thereof, and because of the Master's interpretation and conclusion concerning the decree and said opinion of the Court of Appeals.

(A. R. 7073-7075)

3.

We object and except to the entire report of the Master, and each part thereof, on account of his refusal to receive any testimony of the Wrigley Company (repeatedly offered to be proved by competent witnesses having knowledge
329 of the facts, and with the admission of the Larson Company's counsel that each of said witnesses might be considered as present in court for this purpose), which would have conclusively provided that all of the sales of Wrigley's Doublemint gum in the enjoined dress, and all profits and gains derived therefrom, were made because of the reputation and distinctive advertising of the Wm. Wrigley Jr. Company, its plain marking of all sticks, packages and boxes of Doublemint gum conspicuously with its own name, and in most instances with its own name as manufacturer thereof, and that none of the sales of Doublemint gum or profits or gains derived therefrom were made or influenced by the enjoined dress.

4.

We object and except to the entire report of the Master, and each part thereof, because of his interpretation of the decree, his conclusions of law relative thereto, his accounting proceedings and rulings therein, and to his findings of facts, and because of his failure to receive pertinent and competent testimony, and to make proper findings thereon.

4a.

We respectfully request that the Master state and find that the only similarity claimed by the Larson Company to have

been admitted in the pleadings which was likely to have caused confusion between the enjoined package of Wrigley's Doublemint gum and Larson's Wintermint gum was "caused by the green wrappers around the individual sticks" (Larson Company original brief, C. C. A. p. 25), and that the Larson Company failed to prove and that the record fails to show that any profits were derived by the Wrigley Company on account of its thus wrapping its individual sticks of Doublemint gum, and the sale thereof, and that the Larson Company therefore is not entitled to any finding or award of profits under the decree herein (see argument of Mr. Lane, pp. 3-21; 109-131; 178-180). We object and except to the report of the Master and each part thereof on account of his failure to so state and find.

330 "Preliminary" (Draft Report, p. 2).

5.

We suggest that the Master has inaccurately and incompletely stated the pleadings in his "Preliminary" to the report on pages 2 and 3 wherein he says that the bill of complaint filed by said Wm. Wrigley Jr. Company (which will sometimes be herein referred to as the "Wrigley Company" or "Wrigley's") on June 15, 1915, alleges that confusion existed and would continue between the Wrigley Doublemint package and the Larson Wintermint package and that the Larson Company in its answer and counter-claim prayed for an injunction and accounting and in not stating that the answer filed by the Wrigley Company to the answer and counter-claim of said L. P. Larson Jr. Company (which will sometimes be herein referred to as "Larson Company or "Larson's") expressly denies that any confusion has resulted in the trade between said Doublemint and Wintermint packages by reason of such similarity in colors as may exist between said packages.

The Master should have found that said bill of complaint merely avers upon information and belief the likelihood of confusion and that the same was due to the conduct of the defendants to said bill. (See bill of complaint, paragraphs IX and X. The same will be found at pages 41, 42 of printed transcript of record in 7th C. C. A. on first appeal in Numbers 2498 and 2500). And the Master should have found that said

answer and counterclaim prayed an accounting of profits
331 only insofar as they were diverted from said L. P. Larson Jr. Company and insofar as they arose out of infringing acts, and that said answer and counterclaim also prayed that said Wm. Wrigley Jr. Company account for and pay over all damages sustained by said Larson Company by reason of such infringement and unlawful acts. (See said answer page 63 of said printed transcript).

"Findings" (Draft Report, p. 4).

6.

In the middle of the first paragraph on page 4 under the head "Findings", the Master has used the expression "an incomplete account". We suggest that the word "incomplete" be omitted, for in view of the language following, the word is unnecessary and may create an inference, unwarranted by the record, that the Wrigley Company failed to give the information required by the Master under his order on the Wrigley Company to file this first account, and, unless this change be made, we object and except to this statement of the Master.

7.

We suggest that the Master state at the end of page 4 (or elsewhere) that the Wrigley Company, at the time of filing the various statements of account furnished in compli-
332 ance with the Master's order, did so under protest and objections, and stated as partial grounds for the same, the following:

(a) That the Master's order is not warranted by the record, or by the decree of reference;

(b) That no sales of Doublemint were made by Wrigley Company except under its own name as manufacturer and in boxes and wrappers plainly identifying such Doublemint as Wrigley Company's product, and that no gains or profits have accrued to the Wrigley Company by reason of this Doublemint gum having been sold in said dress, labels or wrappers, except as said dress, labels or wrappers identified said product with its name, reputation and advertisement, and which gains and profits wold equally have accrued to the Wrigley Company if said Doublemint had been sold in dress, labels or wrappers corresponding in all respects (except its registered trade name Doublemint and its regis-

tered trade mark double spear) with those used by the Wrigley Company, and identified with its reputation, when the product of the Larson Company was first placed upon the market, and for many years prior thereto;

(c) No Doublemint was sold as, or confused with the Larson Company's Wintermint, or any of its products;

(d) That so far as the Wrigley Company knows, or is able to ascertain, none of its packages of Doublemint gum was ever sold or bought as the product of the Larson Com-
333 pany, but was all sold and bought exclusively as the product of the Wrigley Company;

and that the Wrigley Company has insisted upon these protests and objections throughout this accounting proceeding. (Objections to Wrigley account December 3, 1918 (A. R.* p. 174-5); December 10, 1918 (A. R. p. 239); March 6, 1919 (A. R. p. 1160). 169-171; 173; 174-6; And we object and except to the Master's overruling said protests and objections (169-176).

Unless these protests and objections are properly referred to by the Master, the Wrigley Company respectfully objects and excepts to the report of the Master as incomplete and improper.

8.

On page 5, line 2, of the report we suggest that the Master strike out the word "practically", as the Larson Company put in issue all of the matters stated in the filed account, and we object and except to this statement of the Master unless so changed. (See objections filed by Larson Company with Master, December 5, 1918).

9.

We request that the Master insert in his report on page 5, line 3, after the word "account", the date when these ob-
334 jections* were made, viz., December 5, 1918, and in lieu of the words "shortly thereafter" in the same line, that the dates be stated, March 4, 1919, and March 6, 1919 (A. R. pp. 997, 1160), when the Larson Company accepted the costs of manufacture and the receipts of sales.

Unless these changes are made, we object and except to the first paragraph of page 5 of the report.

---

*A. R. and all record references (unless otherwise stated) refer to Accounting Record before the Master.

10.

We request that in next to the last line of page 5 of the report the word "recoverable" be eliminated, and that after the figures "$353,905.22" there be inserted the words "was made during 1917 and 1918". Otherwise the erroneous inference may be drawn that the Wrigley Company has admitted on the face of its filed account that said amount is recoverable.

11.

The master erred in concluding (report, pp. 5, 6) that losses sustained in previous years may not be deducted from profits made in 1917 and 1918.

The Master ought to have concluded as a matter of law that such losses are deductible from such profits, and that no recoverable profits were made, and that the order of reference so required.

335

12.

We respectfully request that the Master insert on page 7, paragraph 2, line 8, after the words "this report", the words "which was objected to by counsel for the Wrigley Company", or language of similar import; and that on page 7, paragraph 3, line 1, after the word "closed", the Master insert the following: "except as to the accounting ordered of the Canadian and Australian companies' businesses". Unless so corrected, we object and except to this portion of the report.

Manufacturing Cost and Sales.

13.

At page 8, paragraph 1, of the report the Master refers to Juicy Fruit as having been put upon the market "as an advertised brand in the latter part of 1915".

We respectfully request that "1915" in the quoted phrase be changed to "1916" so as to conform to the record.

In inaccuracy in the report may be due to the Master's reading of the early testimony of Mr. Stanley where, while testifying generally, he first stated that the Juicy Fruit advertising began in the fall of 1915. That statement was

shown by Mr. Stanley to be inaccurate in his subsequent definite testimony, and also by the records and exhibits.

A. R. 874; 875;

Touche, Niven & Co.'s report (Larson Exhibit 132) pp. 6, 8, 9;

336 As the date when the Wrigley Company first began to advertise Juicy Fruit affects the advertising account, we also draw attention to the Touche, Niven & Co. report (Larson Exhibit 132, p. 6) headed "Newspapers and Magazines" which shows that there was no newspaper advertising of Juicy Fruit until 1916, and then only 1.24 per cent of the newspaper advertising done during that year was for Juicy Fruit; and pages 8 and 9 of said report (headnote, "Street Cars" show that no advertising of Juicy Fruit in street cars was done prior to November 16, 1916, and the record shows that the Juicy Fruit advertising campaign was initiated by street car advertising (A. R. 874).

We also respectfully request that on page 8, line 7, of the report the word, "advertised", be substituted for the word "pushed", to conform to the record (A. R. 954-960; 794-800).

Unless the changes requested in this paragraph No. 13, be made we object and except to this portion of the report.

14.

We respectfully request that the Master insert on page 8, paragraph 2, line 4, after the word "handled", or elsewhere in his report, a statement to the effect that—

(a) The Wrigley Company at all times during the accounting proceedings made its books and records available to
337 the Master, to the accountants appointed by him, and to the various accountants of the Larson Company;

Wrigley: 213;

Hagberg: 3370;

Stanley: 6139; 6233; 6267; 6293; 6466;

Vincent: 2729;

Statement of counsel: 343.

(b) That these books and records were so kept as to properly reflect the business of the Wrigley Company is admitted by the accountants for the Larson Company;

Vincent: 2730; 2783; 2890; 3006; 3016-7; 3032-3; 3283; A. R. 3360;

Hagberg: 3281; 3373

(c) That the Wrigley Company's books and records were

kept in such a manner as to make possible a segregation therefrom of all of the items of receipts, disbursements and expenses pertaining to the manufacture and sale of Doublemint gum during the accounting period.

Cox: 56; 65;
Buck: 82, 8; 93, 5; 102;
Eckerly: 124;
Paine: 140; 2569; 2561;
Stanley: 940; 6232-7; 6072; 607-609; 840-851; 886-898; 993-994; 1032-1040; 1131-1134; 1140-1141; 1171-1177; 1285-7;
Benington: 6902; 7254, 65;
Wrigley Ex. 92, Benington 1, p. 3;
Statement of Master: 6126.

In the last line of paragraph 2, page 8, it is requested that the word "manufacturing" be inserted immediately preceding the word "cost", in order that it may be made entirely clear to what cost the Master is referring.

338

We object and except to the draft report in its present form because of the failure in each of the above instances to make statements, as aforesaid.

15.

On page 8, last three lines, it is requested that the Master amplify what he means by "total sales", i. e., whether it is total gum sales, or total sales of gum and all other merchandise sold by the Wrigley Company, on which he is basing his percentage of Doublemint sales to total sales appearing on page 9 of the Report.

We object and except to the report in its present form because of the failure to clarify the Master's statement in this regard.

16.

We object and except to the comparison between total sales and Doublemint sales, and to the percentages shown on page 9 of the Report relative thereto, as it considers all Doublemint sales as distinguished from Doublemint sales, if any, resulting from purchasers being misled into purchasing Wrigley's Doublemint as and for the Larson Wintermint gum, and regardless of whether there was, in fact, any competition between the two products, or whether all, or any sales of Wrigley's Doublemint gum during the accounting period were made to purchasers who knew of the Wrigley Com-

339

pany's Doublemint gum and purchased it as such, and we request that the Master so state in his report. Page 9 refers to the total sales of Doublemint gum by the Wrigley Company during the accounting period without any deductions therefrom.

17.

At page 9 of the Report, third line from bottom, where the Master refers to "gross profit", we request that he define what he means by "gross profit", and make it entirely clear that this refers simply to the difference between the manufacturing cost and the receipts from sales of Doublemint gum, both in the United States and countries foreign thereto, made by the Wm. Wrigley Jr. Company (the West Virginia corporation), and that none of the expenses of selling Doublemint gum or the general expenses of carrying on the business of the Wrigley Company, have been deducted from the $5,152,689.32 in arriving at these "gross" profits".

Wrigley Ex. 92; Benington, 1, p. 4.

We object and except to this portion of the report in its present form in this particular, because of its failure to so state, and for the further reason that the Master in making this statement of "gross profits", has not taken into consideration, nor received evidence concerning:

(a) The sales of Doublemint gum to purchasers, im-
340 mediate, intermediate and ultimate, who knew they were buying products of the Wm. Wrigley Jr. Company when they were purchasing Wrigley's Doublemint gum;

Stanley: 6807;

Eckerly: 6884; 7077, 83; 7091; 7083-93; 7094; 7099; 7102, 3; 7105-10;

(b) The sales of Doublemint gum in territory where there was no competition or likelihood of competition between the Larson Company and the Wrigley Company; and

Eckerly: 7114, 16, 8;

Williams: 7118-23;

Hackanson: 7125-7;

Chapman: 7127;

By others: 7130;

Eckerly: 7112; 7113; 7114; 7115, 6;

Stanley: 7035;

(c) The sales of Wrigley's Doublemint gum not made because of confusion in the minds of the purchasing public of Doublemint gum with the Larson Wintermint product, or any

other product of the Larson Company; and for reasons more fully herein stated.

Eckerly and others: 7107, 8, 9, 11;
Eckerly: 7104

341 Advertising: (Report pp. 11-20)

18.

We object and except to the Master's conclusion and finding (p. 11) that the total amount paid out for advertising during the accounting period, exclusive of donations of money, amounts to $6,798,662.73, and that this figure is not in dispute, insofar as he has omitted to include in this total such amounts as were paid after the close of the accounting period for advertising done during the accounting period.

19.

We object and except to the Master's finding (top p. 12) that the Wrigley Co. contends advertising was placed to sell brands, and that if there was also an institutional value it was incidental and should not be considered in this accounting.

The Master should have found that the Wrigley Company always contended that none of its advertisements which refers to or pictures a brand was institutional, and the Master should further have found that none of the advertising done by the Wrigley Company during the accounting period which refers to or pictures a brand, is institutional advertising but that such advertising as refers to, or pictures a brand, was solely designed and intended to advertise and sell, and resulted only in the sale of the products of the Wm. Wrigley Jr. Company specifically referred to or pictured in such advertisements. And we object and except to the failure of the Master so to find.

Clinton W. Toms: 4494, 4498-4501; 4502; 4431-8; 4466-67;
Benson H. Rowley: 4537-8; 4541; 4542;
Harold A. Lebair: 4949; 4953-54; 4955; 4956; 4968; 4971-77; 4979; 4980;
342 Henry Scott: 5193; 5195; 5196; 4329; 4330; 4319; 4320; 4337;
Louis C. Riecke: 4656; 4678;

Alfred C. Mace: 4623-4626;
Lee Joseph Hart: 4401, 4402, 4398, 4399; 4307;
Harold Bennington: 7296; 7275; 7290; 7291;
Wm. H. Stanley: 1210.

20.

We object and except to the Master's conclusion and finding (bottom pp. 12, 13 of said report) that the name "Wrigley's" was the dominating feature in all display advertising during the greater part of the accounting period, and the general language of the advertisements referred to the name "Wrigley's", rather than to the brands advertised.

The Master should have found that the more prominence given the name "Wrigley's" in any advertisement referring to or picturing one or more brands, the greater is the value of such advertisement in selling the brands referred to or pictured therein; and that the general language of such advertisements refers to the brands advertised therein, and for the sole purpose of selling such brands and securing profit therefrom.

21.

We object and except to the Master's conclusion and finding (p. 13 of report) that the name "Wrigley's", whether prominently displayed, or appearing on the pictures on
343 the packages of the brands themselves, or elsewhere in the avertisements, the spears and spearmen, and the descriptive literature relating to the business, are so commingled and interwoven with brand advertising that an accurate division of brand and institutional advertising cannot be made, and that unless some method can be found that enables a substantially accurate separation, the conclusion is coerced that by reason of admixture, institutional and brand advertising are inextricably commingled.

The Master should have found that the nam "Wrigley's," howsoever displayed or appearing in the advertisements, the spears and spearmen, the pictures, general language and the descriptive literature relating to the business, all drawn attention to and advertise only the specific brands mentioned in such advertisements for the sole purpose of selling the brands advertised.

Acctg. Rec. Stanley, Vol. II, pp. 861, 862; 7609; 789; 770; 861-2;

Larson Exhibit 168 (6428);
Henry Schott: 4288-4305; 5189-5190; 4308-4314; 4323;
Benson H. Rowley: 4507-4530; 4301; 4309-10;
Louis C. Rieck: 4632-4644; 4645;
Lee Jos. Hart: 4347-4354; 4371-4374, 4409-4411; 4360-4365; 4376; 4397; 4398.
James H. Botz: 4821-4840; 4849, 4854, 4858, 4861, 4908; 4843; 4850; 4893-8; 4876, 7;
Harold A. Lebair: 4910-4927; 4937; 4967;
Clinton W. Toms: 4414-4427; 4461; 4478-4480;
Jos. M. Kraus: 4178-4196; 4206; 4207; 4224-6; 4442; 4232-4258;
Harold Benington: 6890-6900; 6958; 7256; 7263, 7268;
Alfred C. Mace, Jr. (Chicago Method): 4551-4559; 4585; 4572; 4591; 4565-4566.

And the Master should also have found that an accurate seperation of brand and institutional advertising can be 344 and has in fact been made by the Wrigley Company (Wrigley Exh. 65, Stanley 1-20 both inclusive; Acctg. Rec. 6314; 6084-6113; 6340-2; 7609; and we object and except to the report of the Master to so find in each of the above instances.

A. R. Stanley: 6079; 6084-6113; 6272-6314; 6322-6323; 6430-6460; 6256-6267; 6297-6302; 7609; 857, 858, 655, 656; 841-851; 885-898; 1131; 2730; 2783; 3016; 3017; 3283; 3284; 3373; 3359; 3394; 2731; 128; 90; 6273; 6257; 6071-6237; 6335-6342; 6460; 6465-6467; 940-941; 6297-6302; 6314; 6084; 6428;
John. S. Hagberg: 3367-3373; 3359-60; 3393-4;
Vincent: 3004-3007; 3012; 3016; 3017; 3281-4; 2730-2732; 2783; 2890; 3032-3033; 3021-3025; 2904; 2862; 2865; 2869;
Statement of Master: 6126.
Freemen: 3505;
James T. Downey: 6404-6421;
Samuel C. Stewart: 6347-6366;
Peter H. Hylleberg: 6380-6404;
Fisk: 6422-6424;
Albert E. Gans: 6424-6425;
E. W. Eckerly: 124, 125.
Paine: 139-140; 2561; 2562; 2570; 2572;

Cox: 65-66;
Harold Benington: 6902-6903;
Whitworth: 3155-3157; 3485; 3486;
Wrigley Exhibit 92, Benington 1, pp. 4, 5, 6, 25.
Larson Exh. 168.

22.

We object and except to the Master's conclusion and
345 finding (p. 13 of report) that the advertising experts who testified admit that such advertising as that placed by said Wrigley Company has an institutional value.

The Master should have found that said witnesses testified that such advertising has no institutional value, and that the cost thereof should be charged as incurred, as a selling expense; and we object and except for his failure to so find.

(Testimony of Stanley: 762, 771, 779, 867-870; 764; 765; 954-960; 794-800; 655; 656; 7390; 7393; 7528; 7538.
Clinton W. Toms: 4494, 4498-4501; 4502; 4431-8; 4466-68; 4456-58; 4503; 4506; 4460-62;
Benson H. Rowley: 4537-8; 4541; 4542; 4356; 4545; 4546;
Harold A. Lebair: 4949; 4953-54; 4955; 4956-4959; 4961-5; 4968; 4971-77; 4979; 4980; 4939-42;
Henry Schott: 5193; 5195; 5196; 4329; 4330; 4319; 4320; 4337; 4325-29; 5206;
Louis C. Rieck: 4656; 4678; 4648; 4677-9; 4676;
Alfred C. Mace: 4623-4626; 4575-7; 4594-97; 4601-3; 4614-16; 4261-3; 4317; 4318;
Lee Joseph Hart: 4401, 4402, 4398, 4399; 4407; 4371-4372; 4378; 4380; 4399-4401; 4394;
Harold Bennington: 7296; 7275; 7290; 7291; 6954-56; 7218; 7237; 7288; 7274; 7270; 7283;
Wm. H. Stanley: 1210.
J. M. Kraus: 4248; 4249; 4233; 4242;
James H. Botz: 4895; 4843-9; 4871; 4901-07; 4880-4886; 4863; 4846; 4847; 4849; 4906, 7;
Wrigley Exh. 92, Benington 1, p. 10.

23.

We object and except to the Master's conclusion and finding (p. 14 of reoprt) that whether Larson in this case should

be charged with institutional advertising is a question of law upon which the opinion of witnesses is of little, value.

The Master should have found that what does and
346 what does not constitute institutional advertising, or brand advertising, is a question of fact and not of law, in this case, and that the opinion of expert witnesses upon that question is of importance and of great value, and we object and except to the Master's failure so to find.

24.

We object and except to the Master's conclusion and finding (p. 14 of report) that where the volume, the details and the complexity of the accounts are so great as in this case, and the books and records were not kept with a view to that end, it is impossible to divide advertising cost with reasonable accuracy according to the space occupied.

The Master should have found that it is possible in this case to divide the advertising cost with reasonable accuracy on the space basis, and that the Wrigley Company has in fact made an actual and accurate measurement of each advertisement, separately, for which it is seeking credit in this case, and that it has actually and accurately ascertained and proven, separately, the following:

(a) The entire cost of all its advertisements during the accounting period, which specified Doublemint gum only:

Wrigley Exh. 65, Stanley 20 (6112-6114).

(b) The cost of the exact space occupied in each of its advertisements during the accounting period by the brand or brands specified therein, whether by a picture of the package, or by a logotype, or by any other matter referring to a specified brand.

347 Wrigley Exh. 65, Stanley 1, 2, 5, 7, 11, 16;
Larson Exh. 139 (3495);
Larson Exh. 151 (3796, 3797);
Larson Exh. 168 (6428);
Wrigley Exh. 92, Benington 1, pp. 4, 5, 6, 25;
John S. Hagberg; 3367; 3373; 3359-60; 3393-4;
Vincent: 3004-3007; 3012; 3016; 3017, 3281-4; 2730-2732; 2783; 2890; 3032-3033; 3021-3025; 2904; 2862; 2865; 2869; 3318; 3320; 3355-7; 2897, 2898, 2908-11; 3048; 2617, 3016, 7, 3283, 4; 6084-6113;
W. H. Stanley: 6071-6237; 6335-6340; 6460; 6465-6467; 940-941; 6272-6314; 6079; 6084-6113; 6322, 3; 3495; 6430-60; 6256-67; 7609; 595-607; 790; 636;

725, 6; 802, 4; 873, 6; 862-8; 847-9; 802-804; 646; 915-940; 842-849; 854-856; 798; 6256-6267; 7609; 6902; 6903; 885-898; 1131; 857; 858; 655; 656; 638-640; 762-768; 725; 726; 967; 602, 603; 607; 608; 609; 645; 646-648; 657;
Freeman: 3505; 3495;
James T. Downey: 6404-6421.
Samuel C. Stewart: 6347-6366;
Peter A. Hyleberg; 6380-6404;
Fisk: 6422-6424;
Albert E. Gans: 6424-6425;
E. W. Eckerly: 124, 125;
Paine: 139-140; 2561; 2562; 2570; 2572, 128;
Cox: 65-66;
Harold Benington: 6902-6903;
Whitworth: 3155-3157; 3485; 3486;
Larson Exh. 24.

25.

348 We object and except to the Master's conclusion and finding (p. 14 of report) that the contention of the Larson Company furnishes the most suitable method of allocating the advertising expenses between the parties, with the modification that the institutional advertising should be amortized over a period of four years, and also to the finding and conclusion (pp. 15, 16 of report) that the so-called institutional advertising should be amortized, and also to his finding that four years is a reasonable period for such amortization, and in adopting such amortization and allocation.

The Master should have found that all the advertising expenses incurred by said Wrigley Company during the accounting period should be charged, at the time the expense is incurred, and that no portion thereof should be deferred, capitalized, treated as an asset, or amortized:

Freeman: 3679-3682; 3849; 3850; 4594; 4595;
Aldrich: 2619-2624;
Alfred C. Mace: 4575-4577; 4594-4597; 4601-4603; 4614-4616; 4621-4630; 4317; 4318.
Clinton W. Toms: 4432-4435; 4456-4458; 4502; 4503; 4506; 4460-4462; 4468; 4449; 4498-4501; 4431-8; 4466-7;
James H. Botz: 4895; 4843-4849; 4871; 4901-4907; 4880; 4885; 4886; 4863;

Harold Benington: 6954-6956; 7218; 7237; 7288; 7274; 7270; 7283; Wrigley Exh. 92, Benington 1, p. 10. 7290-1; 7275; 7296;
Wm. H. Stanley: 762; 764; 771; 868-870; 954-960; 794-800; 655; 656; 7390; 7393; 7528; 7530; 1210;
Harold A. Lebair: 4957-4959; 4961; 4965; 4939-4942; 4962; 4949; 4953-4, 5, 6, 4968; 4971-7; 4979, 80;
Larson Exh. 151, 152.

349 Vincent: 3318; 2753, 5; 3320; 3055, 7; 2897, 8; 2908, 11; 3048; 3054; 2617; 3057; 3352, 3;
Hagberg: 3386, 8; 3390, 1; 3167; 3364-7; 3362; 3374-76.
Louis C. Rieck: 4648; 4677-4679; 4656; 4676, 8;
L. J. Hart: 4371; 4372; 4378; 4380; 4399-4401; 4394; 4401-2; 4398; 4407.
Benson H. Rowley: 4536; 4545; 4546; 4537-8; 4541, 2;
J. M. Kraus: 4248; 4249; 4233; 4242; 4256; 4246.
Henry Schott: 4319, 20; 4325-4329; 5196-5206; 4315-4318; 5193; 4330, 7;
James H. Botz: 4895; 4843; 4846; 4847; 4849; 4907; 4907.

and the Master should have found and adopted, as the most suitable method to do justice between the parties with respect to advertising expense, the method of allocation shown in Wrigley Exhibit 65, Stanley 11 (A. R. 6102), as corrected in Wrigley Exhibit 92, Benington 1 at pages 4, 23, 25, or, in the alternative to so finding, should have adopted either the method shown in Wrigley Exhibit 65, Stanley 16 (A. R. 6106), or Wrigley Exhibit 65, Stanley 2 (A. R. 6079) or Wrigley Exhibit 65, Stanley 7 (A. R. 6097), 6099). We object and except to the finding of the Master for failure so to do.

We request that the Master state and find, in lieu of the last full paragraph on page 14, commencing "The space basis is sometimes the best method for dividing advertising", the following:

The space or prominence basis is the proper and fair method for allocating advertising in this case to arrive at the amount to be deducted from Doublemint's gross profits, and is properly arrived at (Wrigley Exhibit 65, Stanley 11 (A. R. 6102), Wrigley Exhibit 92, Benington, 1, pp. 4, 23, 25) by measuring each advertisement separately and using the fallowing method of allocation, namely—

(a) Where the advertisement specifies only Doublemint, charging the entire cost thereof to Doublemint; and

(b) Where the advertisement specifies Doublemint together with one or more other brands, charging each brand named therein with the cost of the exact space occupied by that brand in the advertisement, whether by a picture of the package, or by a logotype, or by any other matter referring to the specified brand, and charging among the brands named in the advertisement the balance of the cost in the proportion which such space bears to the total space occupied by all packages, logotypes, and any other matter referring to the specified brands.

The proofs show that the Wrigley Company has accurately made these measurements and accurately arrived at the cost of advertising its Doublemint gum during the accounting period from the actual advertising and its books and records and that (so ascertained) it amounts to $2,872,-844.43. The proofs also show that the Wrigley Company has accurately measured and arrived at accurate results based upon alternative methods, as shown in Wrigley Exh. 65, Stanley 2 (6079); Wrigley Exh. 65, Stanley 16 (6016); Wrigley Exh. 65, Stanley 7 (6097-6099).

Unless the Master makes the changes requested, we object and except to such failure and to his finding.

350 26.

The Master erred in refusing (over the Wrigley Company's objections and exceptions) to receive the evidence offered by the Wrigley Company of fourteen competent, disinterested, expert witnesses, and of each of them, which evidence, if received, would have shown that said witnesses were familiar with and had experience in national advertising, and that it is customary and proper to charge the entire expense of advertising a given product as a selling expense at the time the same is incurred, and that the allocation of such expenses on a sales basis will not truly reflect the profits derived from the advertised article, and that each of said witnesses has examined Larson Exhibits 30-36, inclusive, and is familiar with the manner in which the Wrigley Company advertised during the accounting period and allocated the expense of such advertising in arriving at Doublemint's profit shown on Wrigley Exhibit 65, Stanley 11, and Wrigley Exh. 92, Benington 1, at pp. 4, 23, 25, and that the method

of allocation adopted in preparing said Wrigley Exhibit 65, Stanley 11, is the one generally used by merchants and manufacturers in ascertaining the profits of their advertised articles, and is the fairest and most equitable method of arriving at such profits, and that the entire expense of said Wrigley Company's advertisements should be charged at the time when incurred and as a selling expense, against the products mentioned in the advertisements, on the basis used in said Wrigley Exh. 65, Stanley 11, and that said method should be adopted whether in an accounting between the departments of a business, or between various advertised products, or where one is seeking accurately to ascertain the
actual profits of a given article in order that They can be
351 paid over to an outsider who has been awarded the profits
by a court decree, and we object and except to his failure so to do.

(Rec. 4984-4986; 7620-7627.)

27.

The Master should have found that even if the Wrigley Company's advertising during the accounting period had any deferred value at the end of the accounting period, it would not be recoverable under the decree and also that such value could not be measured, and is uncertain, indefinite and conjectural, and we object and except to his failure so to do.

Harold A. Lebair: 4960-4961;
Clinton W. Toms: 4473; 4502-3; 4461; 4462; 4468;
Henry Schott: 4346; 4326-4328; 5200;
Harold Benington: 7226-7228; 7229; 7230-1; 6954-5; 7218;
Alfred C. Mace: 4575; 4576; 4577; 4597; 4630;
James H. Botz: 4871; 4905-7; 4845; 4899; 4901-3; 4885; 4886; 4863; 4874; 4855;
L. C. Rieck: 4676; 4677;
Benson H. Rowley: 4536-4545; 4546;
J. M. Kraus: 4248; 4249; 4256;
L. J. Hart: 4378-4399;
Larson Exhibit 132, pp. 11-12;

352 28.

The Master should have concluded as a matter of law that the burden was on the Larson Company of proving that the Wrigley Company's advertising during the accounting period

created a so-called institutional value, if any exists, and that the Larson Company did not sustain such burden of proof and that it should not be allowed any amount on account thereof, and we object and except to the Master's failure so to do.

29.

We object and except to the Master's conclusion and finding (p. 15 of report) that a correct or fair analysis has been made of display advertising done by the Wrigley Company as illustrated by photographic copies of advertisements bound in the transcript and by the seven books of advertising produced before the Master and marked Larson Exhibits 30-36 inclusive, unless he means thereby to refer to Wrigley Exh. 65, Stanley 1-20, the filed account, and Wrigley Exh. 92, Benington 1; and we respectfully request that the Master state how and by whom such analysis was made.

The Master should have found that a correct and fair analysis was made by the Wrigley Company and that the result thereof is correctly shown in Wrigley Exh. 65, Stanley 1-20 (both inclusive), and Wrigley Exh. 92, Benington 1, pp. 4, 23, 25. Record 6274-6290. And unless the Master complies with the above requests we object and except to his failure so to do.

30.

We object and except to the Master's conclusion and finding (p. 16 of report) that the contention against the sales method
—that sales do not always respond in proportion to the
353 advertising expended and especially where a new article
or brand like Doublemint is placed on the market—could be advanced if the Wrigley Company had ceased to sell gum under the name of Doublemint at the close of the accounting period, but as it continued to use the name Doublemint it is fair to assume from its experience with other brands that the returns on Doublemint will finally, fully recompense it for the advertising cost.

The Master should have found that the sales of Doublemint do not properly reflect the expense of advertising it; and that the Wrigley Company neither had the right, nor did it continue to use the enjoined dress after the accounting period, and that therefore, when it discontinued the use thereof, the continuing value, if any of its advertising the enjoined pack-

age was destroyed, and that the continued use of the name Doublemint after the accounting period is immaterial.

The Master should have found that the Wrigley Company's advertising one brand does not benefit, but rather decreases sales of a non-advertised brand.

Wm. H. Stanley: 869; 870; 767; 770; 954-960; 794; 800; 905-915; 833; 843; 3493; 3671.
Alfred C. Mace: 4577-4580; 4581; 4606.
L. J. Hart: 4367; 4373-80.
Schott: 4315.
Botz: 4903, 4849.
Rowly: 4521-2; 4535-36.
Toms: 4435.
Kraus: 4237, 8.
Benington: 1958, 7252, 3.
Rieck: 4640.

The Master should have found that advertising a brand must be continued, otherwise its sales will immediately
354 fall off and will quickly disappear:

Clinton W. Toms: 4226; 4227.
Benson H. Rowley: 4524; 4525; 4547; 4550.
L. J. Hart: 4372; 4367; 4365.
James H. Botz: 4844-4848; 4887.
J. M. Kraus: 4184-6.
Wm. H. Stanley: 764; 765; 768; 868-870; 795-800; 954; 960; 767; 905-15; 833, 43; 34931, 3671.
Louis C. Rieck: 4649; 4650; 4671.
Henry Schott: 4317; 4318.
Alfred C. Mace: 4581; 4606; 4613; 4577-80, 1; 4578.
Harold A. Lebair: 4981; 4962; 4942, 3.

and the Master should have found that there is no evidence in the record justifying him to assume from the Wrigley Company's experience with other brands that the returns on Doublemint will finally, fully or at all recompense the Wrigley Company for the advertising cost. We object and except on account of the Master's failure to so find.

31.

We object and except to the Master's conclusion and finding (p. 16 of record) that by adopting the sales method Larson has been fully compensated for any value remaining in the name Doublemint at the end of the period.

355 We object and except to the finding and conclusion (p. 48 report) that Larson is entitled in this case to any

compensation for the supposed value created in the name Doublemint.

The Master should have found that by adopting the sales method Larson will be more than fully or justly compensated, and that an injustice will thereby be done said Wrigley Company.

32.

The Master should have found that, if the Wrigley Company retained anything of value in connection with its business, or its Doublemint gum, or its right to use the names "Wrigley's" and "Doublemint", at the end of the accounting period because of the business or advertising done by it during the accounting period, or because of anything charged by it to Doublemint in this accounting, then Doublemint gum started with an equal or greater benefit and advantage by reason of the advertising done by the Wrigley Company prior and up to the commencement of the accounting period and also by reason of the plant, equipment, organization and reputation which the Wrigley Company placed at the disposal of the Doublemint business at the beginning of the accounting period.

A. R. Stanley: 771, 833, 905; 836; 844, 61, 65-6, 192, 3493, 3671, 3687, 7613.
Wrigley Exhibit 92, Benington 1, pages 9, 10, 27.
Wm. H. Stanley: 833-834; 836; 844; 861; 965-6; 192; 3493; 3671; 7613.
Harold Benington: 7283-7284.
Alfred C. Mace: 4579.
356 Whitworth: 3435.
Hitchcock Prospectus A. R. 3823.
Larson Exh. 145-a (3745).
Larson Exh. 152 (3821).
Nelson L. Buck: 5525, 5668-5674.
Larson Exh. 132 pp. 10, 11.

33.

We object and except to the Master's finding (Report pp. 15-17) the percentages of so-called institutional advertising in each class of advertising and deducting the same from the total of each class and dividing the remainder among the brands advertised on the basis of their relative sales, and we also object and except to the Master's treating as institutional

the percentages and the amounts found by him at page 17 of his report.

Henry Schott: 4315.
Benson H. Rowley: 4521-2; 4535-36.
Joseph M. Krause: 4237-8.
Louis C. Rieck: 4640.
James H. Botz: 4903; 4849.
Lee Joseph Hart: 4373-4380.
Clinton W. Toms: 4435.
Harold Bennington: 6958; 7252; 7253.
Wm. H. Stanley: 752; 753; 764-6.
Alfred C. Mace (Chicago method): 4580, 1.

357 The Master should have found that the total amounts chargeable to Doublemint gum for the different years of the accounting period on the several classes of advertising containing so-called institutional advertising are fully, properly and correctly shown on Wrigley Exh. 65, Stanley 1-20 inclusive, and on Wrigley Ex. 92, Benington 1, pp. 4, 23, 25.

(Testimony, Stanley 6079, 6272-6314; 6322-23; (6428), 6430-6460; 6256-6267; 6297-6302; 7609; 857, 858, 655, 856, 841-851; 885-898; 1131; 2730; 2783; 3016; 3017; 3283; 3284; 3373; 3359; 3394; 2731; 128; 595-607; 645, 6; 790; 636-40; 725, 6; 967; 854, 6; 798-804; 873, 6; 915-40; 762-8; 847-9; 6071-6237; 6335-6340; 6460; 6465-6467; 940-941.
John S. Hagberg: 3362-3376; 3359-60; 3386-3394; 3167.
Vincent: 3004-3007; 3012; 3016; 3017; 3281-4; 2730-2783; 2890; 3032-3; 3021-3025; 2862; 2865; 2869; 3318, 3320, 3352-3357, 2897, 2898, 2904-2911, 3048, 3054-3057, 2617; 6084-6113.
Freeman: 3505.
James T. Downey: 6404-6421.
Samuel C. Stewart: 6347-6366.
Peter A. Hyleberg: 6380-6404.
Fisk: 6422-6424.
Albert E. Gans: 6424-6425.
E. W. Eckerly: 124, 125.
Paine: 139-140; 2561; 2562; 2570; 2572.
Cox: 65-66.
Wrigley Exh. 92, Benington 1, pp. 4, 5, 6, 25.
Larson Exh. 168.
Harold Benington: 6902-6903.
Whitworth: 3155-57; 3485; 3486.

358 Stanley: Rec. 638-640; 646; 725; 726; 967; 854-6; 798; 802-804; 873-6; 915-40; 762-8; 847-9; 3495; 6902; 6903.

34.

We object and except to the Master's ascertaining (p. 18 of report) Doublemint's portion of such advertising items (or any thereof) as are not named on page 17 of said report (with the exception of detail-men and war-tax rebate certificates) in the same way as its portion of brand advertising was ascertained by the Master—that is, on the basis of Doublemint sales to total sales of advertised brands, and to the master's using the amount so ascertained as a basis for his conclusion.

The Master should have taken Doublemint's portion of such items to be that show non Wrigley Exhibit 65, Stanley 1-20 both inclusive, and Wrigley Ex. 92, Benington 1, pp. 4, 6, 23, 25.

Wrigley Exh. 65, Stanley 1, 2, 5, 7, 11, 16; 6079; 6084-6113.

Stanley: 6256-6284; 6291-6314; Larson Exh. 168, xxxx 6322, 623, 6420-6460; 7609. Wrigley Exh. 92; Rec. 841-849; 885-898; 1131; 595-607; 645, 6; 790; 636-40; 725-6; 967; 854, 6; 798; 802, 4; 873, 6; 905-40; 762-8; 847-9.

35.

On page 18 of the report the Master says that the Wrigley Company in its accounts assigned to Doublemint 33⅓ per cent of the cost of detail-men in 1916.

359 We respectfully request that the Master change this percentage so as to show, in conformity with the record that 35.54 per cent of this expense was charged to Doublemint in 1916. (See Larson Exh. 132, p. 10).

Unless the Master complies with this request, we object and except to his failure so to do.

36.

We object and except to the Master's finding and conclusion (p. 18 of report) that the duties of detail-men are general in their nature, and also in allocating the expense thereof on the basis of Doublemint sales to all sales.

The Master should have found that the duty of detail-men was to look after distribution and place advertising material in the stores that they visit (6326), but when Doublemint was introduced, their primary duties were to introduce Doublemint and nothing else, and to see that Doublemint was in the stores, and to put in the advertising matter and incidentally to check up such advertising as they could see (Stanley 967-970, 6327-6330).

The Master should have allowed the Wrigley Company credit for the amounts paid out by it for detail-men in the manner and to the extent shown on Wrigley Exh. 65, Stanley 12 (6102) and Wrigley Exh. 92, Benington 1, pp. 4, 23, 25.

360

37.

We object and except to the Master's arriving (Report, pp. 18-19) at the amount chargeable to Doublemint on account of war tax rebate certificates by ascertaining the number of boxes of Doublemint given in exchange therefor, multiplying that number by the manufacturing cost of the gum per box, and adding the cost of freight or postage, because the Master did not also add thereto Doublemint's proportion of the cost of printing the certificates themselves.

The Master should have found that Doublemint's portion of cost of redemption of war tax rebate certificates is $99,-939.51 (Wrigley Exh. 92, Benington 1, p. 25), and the Master erred in finding that amount to be only $92,797.21, at p. 20 of the report.

38.

We object and except to the Master's "Summary of Advertising" on p. 20 of the report, and to each and every item and part thereof.

39.

We object and except to the Master's finding and conclusion (report p. 20) that only $996,127.45 should be allowed the Wrigley Company as a credit for its advertising expenses.

He should have allowed the Wrigley Company the sum of $2,872,844.43 for advertising expense.

See record references, Objections 21-25, 19, 27, 30, 32-34, 36.

361 40.

In order that the court may have the information necessary to enable it to know how the Master made his calculations in arriving at his conclusions concerning advertising, we respectfully request the Master to state in his Report the following:

(a) From what testimony or exhibits, and how he arrived at the percentages referred to and used by him at page 17 of his Report;

(b) From what testimony or exhibits, and how he arrived at the totals shown in the column entitled "Total" next to the last column on page 17 of his report; and

(c) From what testimony or exhibits and how he arrived at the sums which he apportioned in determining the figures shown on page 20 of said report ("Summary of Advertising"), and what were the amounts of each class of advertising which were thus apportioned (classifying the amounts thus apportioned in a manner similar to the classification shown on Larson Exh. 168), and unless the Master complies with this request we object and except to his failure so to do.

41.

We respectfully request that the Master receive in evidence the Wrigley Company's working sheets heretofore offered in evidence, (Rec. 2414-2421; 7674); and unless the Master complies with this request, we object and except to his failure so to do.

362 42.

We object and except to the Master's finding and conclusion (p. 19 of report) that the Wrigley Company received advertising on programs and local trade papers, etc., for only a small portion of the items aggregating $191,267.62 expended for patriotic, benevolent, religious and business organizations, and that the value received from an advertising point of view is small and cannot be ascertained, and that it is doubtful if those disbursements had any other effect than to help to build up a good-will for the Wrigley Company, and that though they may, to some degree, have benefited sales, yet, if so, the benefits derived were not great and are incapable of ascertainment.

The Master should have found that said sum of $191,267.62, and every part thereof, was paid out by the Wrigley Company during the accounting period to various associations and organizations, as reasonable, usual and proper expenses of its business, and that each of said disbursements was necessary and proper in the ordinary and usual conduct of its business and in order to advertise and also to protect the same, and to advance the interests of the Wrigley Company and to procure and maintain the good will of its patrons and of the public.

Wm. Henry Stanley: 6693-6801; Rec. 1013-1015; Wrigley Exh. 71, Stanley 1.

43.

We object and except to the Master's finding and conclusion (p. 19 of report) that nothing on account of said 363 expenditures should be deducted from Larson's profits.

The Master should have found that $28,740.38 of said sum of $191,267.62 was properly chargeable against Doublemint. (Wrigley Exh. 92, Benington 1, Exhibit "A 1", page 23-a.)

Deductions.

44.

We respectfully request that the Master state on page 10, or at some other suitable place in this report, that all of the deductions referred to in said report relate to all sales of Wrigley's Doublemint gum made during the accounting period, except the sales made by the Canadian and Australian companies, and we object and except to his report for failure so to state.

Overhead Expenses.

45.

We object and except to the Master's finding and conclusion (pp. 21 and 22 of said report) that, as Larson accepted the manufacturing cost as stated in the filed account, the items, "depreciation on buildings," "tax on essential oil", and "salaries and expenses of Brooklyn and Toronto," are

conclusively presumed to be included therein, and should not be allowed as overhead.

364 The Master should have allowed the Wrigley Company to deduct said three items, and each thereof, as claimed by it.

(Wrigley Exh. 92, Benington 1, pp. 55, 56, 67) Buck. A. R. 363.

A. R. 447 Which was over two months before Aldrich 426-8 announced his acceptance of manufacturing 446 costs.

46.

We object and except to the failure of the Master to find in connection with the Frank F. Pulver transaction (pp. 23, 24 of Report), that, at the time of the settlement of the infringement suit referred to by the Master, said Pulver was engaged in a competing and growing gum business, and that, by the terms of said settlement agreement, said Pulver sold to the Wrigley Company his valuable business and good will thereof, and also valuable machinery, supplies, trade-marks and trade-names, and that it was also of value to the Wrigley Company to procure said Pulver's agreement not to engage in the chewing-gum business in the United States or Canada for a period of 25 years (See agreement in original stenographic transcript of trial before Judge Anderson, p. 244; Wrigley Exh. 92, Benington 1, pp. 61, 62.)

The Master erred in disallowing said Pulver item. The Master should have allowed $33,107.48 as a deduction from the Doublemint profits arrived at by writing off $241,097 (the difference between the total amount of $250,000 paid Pulver and the amount realized from the sale by Wrigley of Pulver's tangible assets, $8903), in equal installments commencing

365 December 19, 1913 and ending December 31, 1918.

(Benington, 7193-7196; Marwick, Mitchell Peet & Co. Report, pp. 76-7; Whitworth, 3463; Paine, 2483-4, 2583.)

Vol. I stenographic copy of proceedings before Judge Anderson, pp. 244, 248, 257 (Exhs. 10, 11, 12);

Vol. II, id. p. 570;

Printed transcr. of Rec. on 1st App., pp. 53 (Par. IV); 116-122; 125, 126; 141, 147;

47.

We object and except to the Master's finding and conclusion (p. 24 of Report) that Larson's contention that the item of "Cost of alterations of main office" should be charged off over the life of Wrigley's lease, is fair and just between the parties, and in allowing only $114.19 for that item.

The Master should have found that Larson's said contention is unfair and unjust, and he should have refused to adopt Larson's said suggestion, and he should have allowed the Wrigley Company credit for $418.10 for said item.

Wrgley Exh. 92, Benington 1, p. 64;
Paine, A. R. 2506, 15; 2600, 10.

48.

We object and except to the Master's finding and conclusion (pp. 24, 25 of Report) that it is improbable that Doublemint would have received any material benefit during the accounting period, from the item of expense, "Plans for factory additions," as it is unlikely that such a building would have been completed before the close of the accounting period, and that it is not a proper expense but should have been charged to the cost of building.

366 The Master should have found that said item constituted a proper item of expense, and he should have allowed the charge made therefor by the Wrigley Company.

Wrigley Exh. 92, Benington 1, p. 65;
Paine, 2534;
Stanley, 6924.

49.

We object and except to the Master's finding and conclusion (pp. 26-7 of Report) that the "Advances to chicle-growers" were not established by the Wrigley Company as losses accruing within the accounting period, and in disallowing the Wrigley Company's claim for said advances.

The Master should have found that said losses were proven by the Wrigley Company to have been sustained during the accounting period, and the amount thereof should have been allowed by the Master as a proper deduction from the Doublemint profits.

Wrigley Exh. 92, Benington 1, p. 78;

Benington, 7211-7216;
Paine, 2396.

Reapportionment of 1918 Overhead (Report, p. 28.)

50.

We object and except to the Master's not allowing the Wrigley Company to deduct from the profits on Doublemint, $12,500.25 as a result of reapportioning the 1918 overhead, as was sought to be done in Wrigley Exhibit 92, Benington 1, pp. 85, 86, 87.

367 Brooklyn Moving Expenses.

51.

We object to the Master's finding and conclusion (pp. 30, 31 of Report) that the claim filed by the Wrigley Company against the United States Government covers a part only of the claim presented here, and that no good reason is given why it should not cover the entire claim, and to the Master's failure to allow the Wrigley Company to deduct $28,392.93 from Doublemint profits.

The Master should have found that the nature and details of the claim filed against the Government are immaterial in this case, and that a good reason has been shown why the claim against the Government did not cover the entire claim filed here.

Wrigley Exh. 92, Benington 1, pp. 94-100 inc.;
Stanley:—6998-7015; 7037-7038;
Larson Exh. 173;
Benington:—7163-7168; 7184-7187;
Paine:—2485, 2518;
Whitworth:—3419.

Summary of Overhead Expenses. (Report, p. 33.)

52.

We object and except to the Master's "Summary of Overhead Expenses", and to the items composing said overhead account, and to his omission of proper items therefrom, and to his allowance of only $915,506.09 as overhead expenses, and to his refusal to allow each of the items as to the Master's

findings on which objections are herein made, and to his refusal to allow $969,669.35 as overhead expenses as shown in Wrigley Exh. 92, Benington 1, pp. 4, 17, 52, 53, 54.

368 United Profit Sharing Coupons.

53.

We object and except to the Master's finding and conclusion (pp. 35-37, inclusive, of Report) that owing to the difference in the commodities with which the coupons were given and in the manner and conditions under which they were issued and redeemed, the experience of one concern issuing coupons is of little value in determining what the experience of another concern would be, and that because of the confusion resulting from the manner in which the coupon business was carried on by Wrigley and the inherent uncertainty and confusion in the coupon system itself, it is impossible to fix, with reasonable accuracy a percentage of issues to cover redemptions, and that any opinion in that respect is necessarily based on conjecture (p. 37); that (p. 37) not more than 33¼ per cent of the coupons issued by the Wrigley Company during the accounting period will finally be presented for redemption; and we also object and except to the Master's using that percentage and allowing only $2,305,318.75 to provide for redemptions (p. 37) and allowing only $98,519.06 as the amount of the contingent liability on account of the issuance of said United Profit Sharing coupons (p. 37) to be deducted from the amount of Doublemint's profits.

The Master should have found that the Wrigley Company proved by competent witnesses the experience of others issuing coupons of more or less analogous character under similar conditions and over a long period of years, and the Master should have found that such testimony was material and of great value, and that the evidence shows with reasonable and sufficient certainty that at least fifty per cent $3,457,978.14 of all the coupons issued by the Wrigley Company during
369 the accounting period will ultimately have to be redeemed by the Wrigley Company, and that the end of the accounting period there existed a contingent liability against the Wrigley Company, because of the coupons issued by it during the accounting period and not redeemed during the accounting period, amounting to at least $1,623,460.04 (Wrigley Exh. 92, Benington 1, p. 31, lines 3, 9,) of which amount

at least $314,252.03 (id. line 13) should be charged to Doublemint in this accounting; and we object and except to the Master's failure to deduct, on account of said contingent liability, the said sum of $314,252.13, instead of only $98,519.06.

Wrigley Exh. 92, Benington, 1, pp. 4, 10, 11, 28, 30, 31;
Rec. 7385; 7386; Larson Exh. 193;
Rec. 7573; 7672; Wrigley Exh. 102; Rec. 7388; 7389; 5003; Larson Exh. 56; Rec. 1183-1202;
Wrigley Exh. 102A; Rec. 7565-7567;
Wrigley Exh. 63, Atwood 2, 3;
Larson Exh. 194;
Marwick, Mitchell, Peat & Co. report pp. 123-129; 142; 1007;
Stanley:—7528-7531; 7383-7390; 6253; 6254; 7389; 7604-08; 6942; 6943; 7385; 7386: 7542-7552; 689-92; 698-18; 722-36; 1004, 5, 6, 8; 6247; 7390-15; 7537, 8; 7566;
Frederick I. Becton:—5222-5236; 52560-5259; 5281-5317; 5341-5360; 5247; Wrigley Exhibits 55, 59;
U. M. Reinach:—5007-5010; 5021-5031; 5037; 5041; 5046; 5049; 5050; 5054;
Clinton W. Toms:—4439-4447; 4453; 4454; 4482-89;
Chas. A. Atwood:—5362-5364; 5372-5380-3; 5393-5421; 5439; 5459; 5467; 5468; 5389; 5474-79; 5393; 5464; 5482-5490; 6316-21; 5434-5439; 5413-7; 5383; 5387; Wrigley Exh. 63, Atwood 2, 3, 5428-34; 6319, 6854; 79;
Al Brenner:—4681-4700; 4706-4713; 4719-4725; 4731-4739.
M. H. Richards:—5077, 5093; 5057-5076;
Martin E. Goetzinger:—4986-4998; 5004; 5005;
Chas. S. Parsons:—5094-5122; 5131;
Edwin Bradley Mortimer:—5142-5166; 5175-5177; 5183; 5184;
370 Henry C. Brine:—4740-4763; 4800; 4817; 4770-4785.
Angus Steven:—3857; 4005.
Freeman:—3766; 3770.
Whitworth:—3102; 3104; 3430; 3431; 3469; 3458; 3471-3472;
Vincent:—2641; 3235; 3236; 3268-3275; 3347-3349; Wrigley Exh. 12, Sheet A; Wrigley Exh. 63, Atwood 7; 2835; 2755; 2913; 3291; 3307; 3209; 3270-1; 3304-6; 3330-5; 3346; 4269;

Eckerly:—737-42.
Offers to prove:—6350, 51; 7628-30; 5409-14;
Kirkman:—7628-7630;

54.

We object and except to the Master's refusal (over the Wrigley Company's objections and exceptions) to receive the evidence offered by the Wrigley Company to prove (6247-6251; Wrigley Exh. 65, Stanley 32) that over half of the Wrigley Company's coupons were distributed during the accounting period in territory where there were only a third of the redemption stations, and that it did only about 45 per cent. of its business in territory where there were about two-thirds of the redemption stations, and that only about 40 million people lived in the places where the redemption stations were, and that over 65 million people (using 1920 census as basis) lived in territory where there were no redemption stations at all; that during the accounting period 19.4 per cent. of the Wrigley Company's coupons were distributed in four states where there were 102 redemption stations; that 45.8 per cent. of its coupons were distributed in eight states where there were a maximum of 163 premium stations, and that the remaining 54.2 per cent. of its coupons were distributed in the remainder of the United States in which there were only 81 redemption stations; that 7.5 per cent. of the 371 coupons, distributed during the accounting period were distributed in ten states where there were no redemption stations, and that in 18 states in which there were only 11 redemption stations 15.7 per cent. of the coupons were distributed, and that in 8 states where there were only 11 redemption station 8.2 per cent. of the coupons were distributed.

The Master should have found that the United States Government has, for taxation purposes, permitted the Wrigley Company to set up a reserve, based on the Wrigley Company having to ultimately redeem 60% of all its issued coupons, and that there should be deducted from the Wrigley Company's gross profits an amount based upon the Wrigley Company having to redeem at least 50% of all its coupons issued during the accounting period; and we object and except to the Master's refusing to receive the evidence of witnesses to support these findings, and to his failure to so find.

55.

We object and except to he Master's refusal to receive evidence of additional competent witnesses offered by the Wrigley Company to prove their experience in issuing and redeeming over a long period of years coupons similar to Wrigley Company's coupons under circumstances and conditions similar to those under which the Wrigley Company's coupons were issued, and which experience would have shown that the Master erred in using 33⅓ per cent. instead of at least 50 per cent of the value of all coupons issued during the accounting period for determining the amount of the Wrigley Company's liability on account of its issuance of coupons during said period. (A. R. 5209-5214; 7628-7630.)

372 Depreciation of Patents and Patent Rights (Report p. 38).

56.

We object and except to the last three lines of the second paragraph of page 38 of the Master's report where in referring to the value of patents and patent rights owned by the Wrigley Company he says that "it is not established by appraisal, by money price paid therefor, or by other competent evidence," and to the Master's finding (Report, pp. 39-40) that the evidence regarding the value of the common stock, and all the evidence respecting the value of the patents and patent rights, is too speculative and conjectural,—as incorrctly stating the record.

We also object and except to the Master's refusal to consider the testimony taken, or receive that offered, by the Wrigley Company and his findings and conclusion, relative to the value and depreciation of patents and patent rights (pp. 38-40).

See record references in paragraphs numbered 57-59 infra.

57.

We also object and except to the findings and conclusions of the Master, and to each thereof, to the effect that the evidence showing the valuation of patents and patent rights accepted by the Government for taxation purposes; the evidence regarding the superiority in use of and the savings

from the use of the machines made under these patents and patent rights, over machinery open to Larson and other manufacturers, and the rest of the testimony in the record pertinent thereto was of insufficient significance, or certainty, to permit the Master to arrive at a fair and reasonable approximation of the value of these patents and patent rights for the purpose of making deductions therefor from the so-called gross profits.

373 The Master should have found that giving consideration to all the evidence, including the valuation placed on the patents and patent rights of the Wrigley Company by Nelson L. Buck and by the Government—($1,500,000.); the amount of stock paid for these patents and patent rights by the Wrigley Company; the value of the stock which was used in payment for the purchase of these patents and patent rights; and the evidence of the savings resulting from their use in the manufacture of Doublemint gum,—that the patents and patent rights were reasonably worth at least $1,500,000., and that there should be deducted from the gross profits of Doublemint in arriving at the net profits in this accounting the sum of $64,267.43 as depreciation of patents and patent rights during the accounting period; and we object and except to the Master's failure and refusal to so find.

Stanley: 672; 6810; 6811; 6814; 833; 834; 905; 906; 192; 3493; 3671; 3687; 7613; 6927.
Benington: 7182;
Hitchcock prospectus, A. R. 3823;
Sessions: 6672-83;
Larson Exh. 145a (3745);
Larson Exh. 152 (3821);
Nelson L. Buck: 5525; 5668-5674; 5528; 5535; 5823-8; 5547-51; 5670; 5701; 5998; 6010; 6035; 6558, 9; 6567-71; 6581; 6620-39; 6624;
Buck's Excluded Testimony and Exhibits.
Freeman: 3727; 3788;
Wrigley Exh. 92, Benington 1, p. 16;
Vincent: 2847, 2851; 2929; 2978; 3264;
Becker: 6543.

374 58.

We object and except to the Master's excluding (over the Wrigley Company's objections and exceptions) the evidence introduced and also to his not receiving that offered, showing

the superiority and savings made in the use of the machines made under the patents and patent rights over machinery open to Larson and other manufacturers;

Larson:
Buck:
Sessions:

59.

We object and except to the Master's refusal to permit the Wrigley Company to prove the value of its common stock in 1914, 1915 and 1916, and also to prove the amount of dividends paid by the Wrigley Company thereon in 1911, 1912, 1913 and 1914.

(6255-6256; 6081-6804).
(5525-5530; 5668-5676).

375 Miscellaneous Income. (Report, p. 41.)

60.

We object and except to the Master's finding and conclusion (p. 41) that profits were realized and retained by the Wrigley Company on the Doublemint business during each of the accounting periods, and that Doublemint should have credit for its share of any income from the investment of such funds whether considered as invested in the gum business or otherwise; and we further object and except to the Master's considering and treating the assumed accumulated Doublemint profits as Doublemint's investment in the business, and to the Master's allocating the total of so-called "miscellaneous income" amounting to $349,804.89 in the proportion that the accumulated profits of Doublemint at the first of each calendar year bear to the total invested capital excluding intangibles.

We also object to and except to the Master's adding to the Doublemint profits the sum of $71,905.74 as "miscellaneous income", as he did in his "Summary of Profits", at p. 47 of said report.

61.

We object and except to the Master's including in this accounting any portion of the item of "Miscellaneous Income" as a gain or profit on Doublemint gum, unless interest on the

Wrigley Company's invested capital be deducted from Doublemint profits; and if such deduction be made for interest on invested capital, then the Master should find that only $26,202.73, instead of $71,905.74, should be added to Doublemint profits, said sum of $26,202.73 being the proper proportion of such part of said "Miscellaneous Income" as was derived from investments forming a part of the Wrigley Company's invested capital on which interest is allowed.

376

Wrigley Exh. 92, Benington 1, pp. 103, 104.

62.

We suggest and request that the Master insert, on the bottom line of page 41 of the Report, after the word "considered" the words "for the purpose of apportioning 'miscellaneous income' ", otherwise an improper inference may be drawn from the Master's statement that these accumulated Doublemint profits were all the invested capital necessary to carry on the Doublemint business.

Buck: 377; 379; 464; 5556; 5564; 5520; 5597; 5598, 99;

63.

We respectfully request that the Master state in his report

(a) What amounts he used for Invested Capital at the first of each calendar year during the accounting period, in making his allocation on pp. 41 and 47 of said report of "miscellaneous income", and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the Master to enable him to arrive at the amounts of Invested Capital used by him in this connection;

377

(b) What amounts he used for "miscellaneous income" for each of the accounting periods in making his allocation thereof on pp. 41, 47 of said report, and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the Master to enable him to arrive at the amounts of miscellaneous income used by him in this connection.

Unless the Master complies with these requests, we object and except to his failure so to do.

378 Federal Taxes. (Report pp. 42-45.)

64.

We object and except to the Master's finding and conclusion (p. 42 of report) that it was improper for the Wrigley Company to deduct for its Federal income and excess profits taxes for the years 1917 and 1918 an amount arrived at on the theory that Doublemint profits were the last to be made and should therefore bear the highest rate of tax, and that it was later on so conceded.

The Master should have found that the Wrigley Company has at all times insisted that said taxes should be allowed to it at the highest rate.

See filed accounts Benington 7162; 7302;
Offers to Prove 7032; 7132.

65.

We object and except to the Master's finding and conclusion (p. 43 of report) that it does not appear that when the Wrigley Company paid its taxes for 1917 or 1918, or since the decree was entered, the Wrigley Company at any time informed the Government of either the pendency of this suit, or of the terms of said decree, or took any other protecting steps in its behalf.

379 The Master should have found that whether or not the Wrigley Company gave any such information to the Government is immaterial in this case; and we object and except to the failure of the Master to so find.

66.

We object and except to the Master's finding and conclusion (p. 43 of report) that if Larson is charged in this accounting with taxes paid by Wrigley, it will be subjected to double taxation.

67.

We object and except to the Master's finding and conclusion (Report p. 44) that the evidence indicates that the profits of the Wrigley Company for two years will be ample to cover the amount of the profits awarded to Larson by the Master, as there was no evidence to justify said finding.

68.

We object and except to the Master's finding and conclusions (Report p. 44) that the facts in this case do not require a court of equity, in its discretion, to relieve against hardships from changes in the Federal Tax Laws, and (Report p. 45) that if the Wrigley Company is entitled to relief in that connection, it must obtain it from the Government and that, if necessary, courts of equity are open for that purpose.

380

69.

The Master should have allowed the Wrigley Company to deduct $621,108.97 in this accounting for the Federal income and excess profits taxes which it paid on account of its Doublemint profits for the years 1917 and 1918; and if the law be otherwise, and if the Doublemint profits had been the only profits earned by the Wrigley Company in 1917 and 1918 and are so treated, then the Wrigley Company should have been allowed $427,737.51 on account of said taxes; and if the law be otherwise, then the Master should have allowed the Wrigley Company, because of the payment by it of said taxes, at least the sum of $372,942.09, that being the same proportion of the total taxes paid by the Wrigley Company in 1917 and 1918, as the profits from Doublemint gum during those two years bore to the total profits of the company in those two years. We object and except to the Master's failure to make allowances and findings as aforesaid.

Wrigley Exh. 92, Benington 1, pp. 18-23; 106-107;
Benington; 7301-7307; 7187-7192; 7614-7619; 7310-7314; 7323-7325; 7163;
Account filed by the Wrigley Company Dec. 3, 1918, p. 4, foot-note;
Account filed by the Wrigley Company Dec. 3, 1918, p. 5, foot-note;
Vincent, 3046-3051; 3308-3312; 3443-3444; 3482-3483; 3054; 3048; 2617; 3065; 3057; 3186.

The Master should have found that the court has the power, if necessary, to protect the interests, if any, of the Larson Company with respect to the tentative credit of $422,223.64 which the Wrigley Company deducted from its 1919 income.

381 70.

We object and except to the Master's conclusion that the Wrigley Company is not entitled to make any deduction on account of the Federal Income and Excess Profits Taxes.

71.

We object and except to the Master's denial, over the Wrigley Company's objections and exceptions, of its request that the Larson Company be required to produce before the Master a copy of its Federal tax returns for the years 1914, 1915, 1916, 1917 and 1918 and for each thereof, and, also, in likewise denying the Wrigley Company's request that the Master appoint a competent auditor, at the Wrigley Company's expense, to examine the books and records of the L. P. Larson Jr. Company so as to furnish the Master all information necessary to enable him and the courts to determine how much Federal Income and Excess Profits Tax the Larson Company would have had to pay on the profits it claims to be entitled to receive from the Wrigley Company in this accounting, if such profits had been paid to the Larson Company as and when earned by the Wrigley Company.
(A. R. 7034; 7046-7053.)

72.

We object and except to the Master's excluding, over the Wrigley Company's objections and exceptions, the proof which it offered to make by the witness, L. P. Larson, Jr.
382 showing precisely what taxes the Larson Company had to pay for its 1917 and 1918 business, and also what amount it would have had to pay as an additional tax upon any further profits which it might have received in those years, and also showing that said Larson Company would have had to pay at least 60% on such amounts of profits as it claims were earned by the Wrigley Company from the manufacture and sale of its Doublemint gum at any time during the accounting period, and that said Larson Company would have had to pay at least as high a percentage as the Wrigley Company had to pay and at least as large an amount as the Wrigley Company deducted in its filed account for Federal Income and Excess Profits Taxes.
(7131-7133; 7028-7032).
(7046-7053).

73.

We suggest that at page 42 of said report, lines 2 and 3 from the bottom, the Master substitute in lieu of the words "awarding to Larson the profits made on the Doublemint business" the following: "an accounting;" and that in the second line on page 43 of the report he substitute for the words "awarding the profits to Larson" the words, "granting an injunction and referring the case to the Master to take an account," and we object and except to the said statement of the Master unless so changed.

383 "Interest on Invested Capital" (Report p. 46).

74.

We object and except to the Master's finding and conclusion that (Report, p. 43) the items making up the investment in tangible assets would have to be recast before an amount could be arrived at which, in a proper case, interest on invested capital might be computed.

The Master should have found that the items making up the investment in tangible assets on which interet is allowable have been sufficiently and properly proven by the Wrigley Company.

Wrigley Exh. 92, Benington 1, pp. 12, 13, 38-43 inclusive.
Wm. H. Stanley; 6929-6931;
Nelson L. Buck: 5596-5599; 5525-5530; 5668-5676;
Benington 6908, 10; 7170, 1, 2, 6.
Wm. Wrigley Jr.: 220; 221;
Vincent 2756; 2848, 2954, 5; 2964; 2921, 31-9; 2891; 2937; 2877;
Whitworth 3128; 3437, 3114.

We respectfully request that the Master re-cast the items making up the Wrigley Company's investment in tangible assets, and also report Doublemint's proportion thereof in each of the accounting periods, so that, if the Court should hold that interest on invested capital is allowable and a proper deduction, and that the items making up the investment in tangible assets require re-casting, it will not be necessary to re-refer the case to a Master; and, unless this request be complied with, we object and except to the Master's failure so to do.

384 The Wrigley Company is entirely willing and hereby offers to place at the Master's disposal, (if he so desires) at its expense, as it has done at all times during the accounting period and while the Master was preparing his draft report, a competent accountant to be selected by the Master to make such calculations, if any, as the Master may require to comply with this request as well as with any and all other requests herein made.

The Master should have allowed interest, as claimed by the Wrigley Company, on Doublemint's proportion of the tangible capital used by the Wrigley Company in its business during the accounting period.

Wrigley Exh. 92, Benington 1, pp. 4, 42, 43;
Benington: 7154-7156; 7170-7174; 7206; 7207;
M. M. Emerick: 6647-6663;
Fremont B. Hitchcock: 6664-6669; Larson Exh. 140; Larson Exh. 152.
James Angus Steven: 3996; 4013;
Stanley: 6929-6931;
Vincent: 2617; 3048; 3054-3057; 3633; 3634; 3064; 3121.

75.

We object and except to the statement of the Master on page 46, third paragraph of the Report that "the decree awards to Larson all gains and profits" as being an inaccurate interpretation of the decree. The Master should have found that the decree makes no award, but refers the case to the Master to take an account.

385 76.

We object and except to the statement and conclusion of the Master (p. 46) that interest on invested capital does not enter into manufacturing, or selling costs, as inconsistent with the rules of law applicable to this case.

77.

We object and except to the statement and conclusion of the Master that "the court directs that the profits be awarded to Larson and does not authorize any deduction to be made therefrom", as inconsistent with the decree, the opinion of the Court of Appeals referred to, and the law.

The attention of the Master is also called to his inconsistency in not taking into consideration interest on invested capital in his report (p. 46), and, at the same time, treating as a part of Doublemint's profits a portion of the amount received as income from invested capital.

78.

We object and except to the Master's failure and refusal to allow the Wrigley Company, Doublemint's proportion of interest, as it calculated the same on a capital value of $1,500,000 for patents and patent rights throughout the accounting period.

See record references in paragraphs 57-59, supra.

79.

We object and except to the Master's failure and refusal to allow the Wrigley Company throughout the accounting period, Doublemint's proportion of interest, as claimed 386 by the Wrigley Company, on $6,000,000, as the amount paid by the Wrigley Company for good will when it was incorporated.

Benington: 7154-7156; 7170-7174; 6995; 6996; 7206-7208;
Whitworth: 3417; 3418; 3463;
Wrigley Exh. 92, Benington 1, pp. 14, 49;
Wrigley Exh. 92, Benington 19, p. 3.
Buck: 5528
Larson Ex. 145a A. R. 3745
Larson Exh. 152 A. R. 3821
Record references in paragraphs 57-59, supra.

80.

We object and except to the Master's failure and refusal to allow the Wrigley Company throughout the accounting period, Doublemint's proportion of interest, as claimed by it, on $7,500,000, as the value of good will, patents and patent rights, purchased by the Wrigley Company when it was incorporated.

See Record references in paragraphs 57-59, 79, supra.

"Manufacturer's Profits.

81.

We object and except to the Master's failure and refusal to allow the Wrigley Company credit for a manufacturer's profits, and to the Master's exclusion (over the Wrigley Company's objections and exceptions) of the evidence thereof.

P. 38 of Wrigley Company's account filed with the Master March 6, 1919.

Wrigley Exh. 92, Benington 2; pp. 7332-7334; 6903-6907.

Offer to prove. 6903-6.

387 "Good Will" (Report p. 48).

82.

We object and except to the Master's finding and conclusion (p. 48 of report) that the Larson Company is entitled to be compensated for the good will created by the Wrigley Company during the accounting period and for the supposed value created in the name "Doublemint," and we object and except to the Master's compensating the Larson Company therefor, and to his adopting as a measure of such compensation, the elimination of so-called institutional advertising, the amortization thereof and the allocation of a portion of the advertising expense on a sales basis.

The Master should have found that the order of reference does not justify or permit his making any allowance to the Larson Company for good will created by the Wrigley Company during the accounting period, or for any part of such good will, or for any value created in the name "Doublemint", and that the burden of proving such good will and value is on the Larson Company, and that it has not sustained such burden, and that there is no satisfactory, reliable or sufficient proof in the record concerning such value, and that the evidence with respect thereto is wholly indefinite, uncertain and speculative.

388 "Interest on Award." (Rep. pp. 49-51)

83.

We object and except to the Master's conclusions with respect to the law as to the payment of interest on an award.

The Master should have found that under the order of reference he has no concern with the question as to whether or not interest should be allowed on an award or finding of profits, or, from what time or, at what rate it should be allowed, if at all, and the Master should have found that those are questions to be passed upon in this case in the first instance by the court and not by the Master; and if he had the power to make any finding or recommendation relating to interest on the amount of his finding of profits in this case he should have found that in an accounting for profits and gains by a defendant in an unfair competition suit, interest does not begin to run prior to an adjudication of the amount of profits and gains, regardless of whether the infringement was innocent, or deliberate and wilfull, and the Master ought to have adopted said rule in this case. We object and except to his failure to so find.

84.

We object and except to the Master's finding and conclusion (p. 50 of report) that from the close of the accounting period to the present time Wrigley has retained profits earned by Doublemint during the accounting period, and used them in its business and received the benefits therefrom in all respects the same as if the profits belonged to it, and that during this time Larson has been deprived of any benefit from
389 the use of such profits, and that it would be in equitable for Wrigley to take Larson's profits and use them while the litigation proceeded, without paying interest thereon.

The Master ought to have found that Wrigley retained no such profits and rightfully took its position to that effect, and that Larson has not been deprived of the benefit of any such profits, and is not entitled to interest.

85.

We object and except to the Master's finding and conclusion (p. 50 of report) and that after the decree had been en-

tered "awarding the profits made on Doublemint to Larson", Wrigley "wrongfully" took the position that no profits were made on Doublemint.

We request that the Master strike out from the paragraph in question the words "awarding the profits made on Doublemint to Larson".

We also request that the word "wrongfully" in said paragraph be eliminated, inasmuch as the Wrigley Company promptly and in good faith filed its account and made available at all times to the Master and to the Larson Company and to its auditors all its books, records and officials, and offered to and in fact did furnish all of them, freely, promptly and fully, all information which they sought, and the use of the word "wrongfully" may be erroneously interpreted as indicating an effort on the Wrigley's part to conceal information. Unless the Master complies with this request, we object and except to such failure.

390 "Claim for Division Because of Legend."

(Report p. 52)

86.

We object and except to the Master's finding and concluding (p. 52 of report) that the claim of the Wrigley Company that the sales of Doublemint gum wrapped in counterbands bearing the legend:

"Made by the Manufacturers of the famous
Wrigley's Spearmint
Wm. Wrigley Jr. Company,
Chicago. New York.
Toronto. London."

should be excluded from its accounting,—is not allowable, and in concluding and finding that the decree requires the Master to award to Larson all profits on Doublemint sold in the infringing dress, and that the Master is not authorized to make any deductions therefrom.

The Master should have found and concluded that he was directed and authorized by the decree to ascertain what portion of the gains and profits of the Wrigley Company arising out of its Doublemint gum sales in the enjoined dress during the accounting period, was due to or arose from causes other than the enjoined dress, and also what portion of said gains

and profits, arose from or were due to the use of said infringing dress, and the Master should have further found that the question of whether or not any award shall be made in this case had not been decided by any Court and is still an open one, and that he was authorized and required by the decree to deduct from the sales, gains and profits of Doublemint gum to be accounted for herein, such as did not result, or arise from the use of the enjoined dress.

391 The Master should have found that the Wrigley Company is not liable for any gains or profits to it accruing or arising from the manufacture and sale of its Doublemint gum wrapped in counterbands bearing said quoted legend, and he should have found that there were no gains or profits accruing to the Wrigley Company, or arising from the manufacture and sale, during the accounting period, of its Doublemint gum enclosed in counterband wrappers which did not bear said quoted legend,

Wrigley Exhibit 92, Benington 16;
Wrigley Exhibit 92, Benington 19; Rec. 6988;
Benington; 6983-6991;
Eckerly: 6857-6888; 6991-2;
Wrigley's Exhibits 72 to 90 both inclusive.
Offer to Prove: 6884, 5; 7094; 7113; 7092; 7099; 6884; 7075; 7091; 7100; 7103.

87.

We object and except to the Master's findings and concluding that the total amount of Doublemint gum sold during the accounting period, wrapped in counterband wrappers not containing said quoted legend, was $278,168.45 (Wrigley Exhibit 92, Benington 19, Statement 1); and that the balance of all Doublemint gum sold by the Wrigley Company in the enjoined dress during the accounting period amounted to $8,639,126.45, being the difference between the total accepted Doublemint sales of $8,917,286.90 (Wrigley Exhibit 92, Benington 1, p. 23) and said sum of $278,160.45.

The Master should have found that no purchaser, immediate, intermediate or ultimate, of any of Wrigley' Doublemint gum bearing said quoted legend, could have been, or was in fact deceived into believing that said gum was not

392 made by the Wrigley Company, or that it was made by the Larson Company, or was the product of any one other than the Wrigley Company.

See references under Par. 86 and on pp. 3-5, supra.

Canadian and Australian Corporations (Report 52).

88.

We object and except to the Master's failure to find, and we request that he find each of the following facts:

That all of the Canadian and Australian sales, and the manufacturing cost thereof, as well as all domestic sales and all sales in all countries foreign to the United States, and the manufacturing cost thereof, are included in the reported gross sales of $8,917,286.90 of Doublemint gum made during the accounting period, and in the manufacturing cost thereof,—$3,764,597.58,—except such sales and manufacturing cost thereof, as were made by the Canadian and Australian corporations; and

That it is conceded by the Larson Company that it sold no Larson's Wintermint gum in Canada or in Australia, (1789, 1790) or in any other country foreign to the United States at any time during the accounting period, or previous thereto.

393 89.

We object and except to the Master's statement (p. 53) that early in January, 1916, "the business in Canada" and "the business in Australia" was incorporated, and we request that in lieu thereof the Master state that early in January, 1916, a Canadian corporation known as the Wm. Wrigley Jr. Company, Ltd. was incorporated, under the laws of Canada, which purchased the business of the Wm. Wrigley Jr. Company theretofore done in Canada, and an Australian Company under the name of Wm. Wrigley Jr. Company, Proprietary, Ltd., was incorporated in Australia, under the laws of Australia, which took over the business theretofore done by the Wm. Wrigley Jr. Company in Australia, and unless the Master complies with this request we object and except to his failure so to do.

Cox 47, 45
Stanley 979, 980-2, 1226-9, 1253.
Wrigley 212; 289; 245.

90.

In lines 11 to 13, page 53, the Master says:

"The Wrigley Company objected that these foreign corporations were separate entities and not included in the decree."

We object and except to that statement, and request that the Master insert after the word "separate" the word "independent", and that he change the words "included in" to "concluded by".

We also request that the Master insert at the end of the sentence in question, a statement showing that the Wrigley Company objected on the further grounds that the business done by those foreign corporations was in territory in which the Larson Company had never sold any Wintermint or other gum, and was unknown.

Aldrich 1790.

See also objections filed with Canadian and Australian accounts.

394 Unless the Master complies with these requests, we object to his failure so to do.

We also object and except to the Master's treating (at p. 25 of said report) the Canadian Company as an instrumentality of the Wrigley Company through which its business was carried on in Canada.

Cox: 45;
Stanley: 979; 1016-9; 2235; 1233-64; 1217-50.
Wrigley: 289; 217; 286;

91.

We object and except to the Master's excluding (over the Wrigley Company's objections and exceptions) the evidence offered to prove (1222-1229) that the Australian Company was incorporated on the suggestion of William H. Stanley, who, at that time, had no connection with the litigation now on hearing, was not familiar with it, and was not then aware that there was any effort on the part of the Larson Company to procure an accounting from the Wrigley Company; and that the sole purpose of incorporation the Australian Company was because of either actual or threatened heavy duties about to be imposed, about the Summer of 1915, by the Australian government upon the importation of gum into Australia, so as to render the prosecution of the gum business by the Wrigley Company in Australia impracticable and unprofitable; and that at that time the Wrigley Company had already shipped machinery to Australia and was in the process of erecting a gum-making plant in Australia and that it was then concluded by the Wrigley Company (the West
395 Virginia Company) to discontinue the completion of that factory and to discontinue its gum business in Australia;

and that there was no intention on the part of said West Virginia Company to organize the Australian Company in order to interfere with any possible decree that might be entered in this suit.

92.

We object and except to the Master's excluding (over the objections and exceptions of the Wrigley Company) its offer to prove that the organization of the Canadian Company had no relation whatsoever to the Larson Company's litigation with the Wrigley Company. (1264).

93.

We object and except to the Master's statement on page 53 that there was a decision of the Court of Appeals "on the question of the Larson Company's right to profits made in territory where competition did not exist," inasmuch as the Court of Appeals did not hold that the Larson Company had any "right to profits", but merely held that the Master should take an account of Wrigley's profits everywhere. In order to avoid uncertainty, we suggest that the Master indicate (53) in his reference to the decision of the Court of Appeals, that he refers to 275 Fed. 535.

94.

Page 54, after the first two lines, where the Master
396 refers to the accounts of the Canadian and Australian businesses having been filed, we suggest that the Master state in substance that the Wrigley Company, at the time of filing said reports, objected and protested to doing so for the following reasons:

First: That is was beyond the jurisdiction of the court, and not warranted by the record, or order of reference.

Second: That no competition ever existed between either the Canadian or Australian Company and the Larson Company, and that no Doublemint gum sold by either the Canadian or Australian Company was sold or confused with the Larson Company's wintermint, or any of its products.

Third: That no sales of Doublemint were made by either the Canadian or Australian Company except in boxes and wrappers plainly identifying such Doublemint product as the product of said Companies, respectively, and that neither of

said foreign Companies derived any gains or profits by reason of its Doublemint dress, labels or wrappers other than would have accrued to such foreign Company if Doublemint gum had been sold in dress, labels or wrappers corresponding in all respects, except said name "Doublemint" and said trademark "Double Spear", with those used by the Wrigley Company, and identified with its reputation when and before the Larson Company's Wintermint was first placed on the market.

397 Unless the Master complies with these suggestions, we object and except to his failure so to do.

(See Objections filed with Canadian report of April 16, 1922, and with Australian report of July 6, 1922.)

95.

We object and except to the statement of the Master commencing with "After argument", last eleven lines on page 54, as inaccurately stating the record. The record and arguments show that from the time of the filing of the accounts of the Canadian and Australian Companies (ordered by the Master) and even previous thereto (Argument Feb. 6, 1922, referred to R. 2880—See also R. 2881—Argument June 15, 1922, and especially page 16, et seq, thereof A. R. 5218 November 1, 1922) the Wrigley Company insisted on the Larson Company making such proofs as it deemed advisable relative to these Canadian and Australian filed accounts, in order that the whole case might be submitted to the various Courts as one matter, instead of "piece meal", as otherwise it would require "piece meal" court hearings. Unless the Master modifies his statement to conform to these suggestions we object to his failure so to do.

96.

We object and except to the Master's ordering the Wrigley Company to file an account of the profits of the Canadian corporation from the sale of its Doublemint gum, as he ought to have found that the Wrigley Company should not ac-

398 count for such profits, if any.

Rec. 283-5; 41-49; 81; 122; 212-218; 245; 283-290; 360; 978-992; 1016-2025; 1084; 1143-1144; 1164-1172; 1216-1250; 1253-1265; 1106-1127.

97.

We object and except to the Master's ordering the Wrigley Company to file an account of the profits of the Australian corporation from the sale of its Doublemint gum, as he ought to have found that the Wrigley Company should not account for such profits, if any.

Rec. 283-5; 41-49; 81; 122; 212-218; 245; 283-290; 360; 978-992; 1016-1025; 1084; 1143-1144; 1164-1172; 1216-1250; 1253-1265; 1106-1127.

98.

We insist that the Larson Company is not entitled to have any further proceedings before the Master concerning the Canadian and Australian accountings for the reasons stated in our objections to the filing of the reports of the Canadian and Australian companies' business, and we object and except to all statements in the Master's report concerning any further proceedings before him relative to said Canadian and Australian businesses.

Compensation of Accountants.

99.

We object and except to the Master's finding and conclusion (p. 55 of Report) that $7,359.50, the amount of Auditor James Hall's bill, or any part thereof, should be taxes as costs in the case and be paid by the Wrigley Company, with six 399 per cent interest from the date of filing the Master's Report.

The Master should have found that no part of said bill should be taxes as costs against, or should be paid by the Wrigley Company, but that said bill should be paid by the Larson Company.

A. R. 4138, 4161.

100.

We object and except to the Master's findings and conclusion (p. 56 of Report) that the amount charged by Touche Niven & Co. for their services in this accounting is a fair and reasonable amount and is not in dispute.

The Master should have found that the matter of compensating Touche Niven & Co. has not been referred to him, and that he has no authority, or power to investigate said matter, or to make any report thereon, and that the Wrigley Company duly objected to the Master making any inquiry as to that subject matter.

101.

We object and except to the Master's finding (p. 56 of Report) that the account filed by the Wrigley Company
400 under Equity Rule 63 did not properly state the results of the business and that Touche Niven & Co. performed the services for which it has charged in a skillful and proper manner.

The Master should have found that the account filed by the Wrigley Company under Equity Rule 63 properly showed that the Wrigley Company earned no profits during the accounting period from the manufacture and sale of its Doublemint Gum in the enjoined dress.

The Master should have found that the services rendered by Touche Niven & Co. were unnecessary and were not rendered in a skillful or proper manner.

Larson Exh. 132, p. 5; Exhibits "C" and "O";
Stanley 6455; 6303-6311; 6370-6377; 6432-6459; 7574-7590;
Wrigley Exh. 92, Benington 1, p. 72;
Marwick, Mitchell, Peet & Co., report, p. 103;
Larson Exh. 132, p. 30; Exh. B;
Wrigley Exh. 11; Rec. 4267;
Whitworth: 4279; 4286; 3458; 3469-3474; 3113; 3139; 3155-3161; 3485; 3486; 3409;
Vincent: 2641; 3235; 3236; 3393; 3305; 3268-3270; 4270-4274; 4277; 4278; 3273; 3274; 3275; 3292-3296; 3021-3024; 2862-2869; 2904-2911; 3004-3006; 3318; 2753-2755; 3320; 3352-3357; 2897-2898; 3038; 3054; 2617; 3056; 3057; 4262-4268; 6473 (Wrigley Exh. 68;) 2811; 3016-3017; 3027-3044; 3228-3244;
John S. Hagberg: 3359-3376; 3386-3394; 3167;
Freeman: 2893; 2894; 3692;

401 102.

We object and except to the Master's statements (p. 55 of Report) that the account filed by the Wrigley Company under Equity Rule 63 was such as to make it necessary or proper for the incurring of such expenses for accountants as the Master finds were incurred by the Larson Company, inasmuch as the filed account showed separately, cost of production, sales, receipts therefrom and gross profits, all of which were accepted as correct by counsel for the Larson Company and by the Master in said report, and the filed account also showed, in appropriate groups, all expenses which were deducted from gross profits, and the Master could have reached the conclusions arrived at in his report from the filed account and the report of Marwick, Mitchell Peat & Co. without the unnecessary, extensive investigation made by Touche Niven & Co. and practically all of Touche, Niven & Company's investigation was in an endeavor to support the Larson Company's groundless objections to the filed report.

103.

The Master should have found, if it was within his power and authority to make any finding at all on the subject (which is denied) that Touche, Niven & Co.'s bill for services should not, nor should any part thereof, be paid by the Wrigley Company.

We object and except to the Master's recommendation (p. 56) that the Wrigley Company be required to pay the Larson Company $17,591.21 and also that said sum run with interest at the rate of six per cent from the filing of the Master's report.

402 104.

We object and except to the Master's refusal (over the Wrigley Company's objections and exceptions) to receive the evidence offered by the Wrigley Company to prove that while Touche, Niven & Company's report, Larson Exhibit 132, was being prepared by it, that firm was and had been the auditors for the Jewel Tea Company for some years and knew that during that period of time the Jewel Tea Company were issuing profit sharing coupons and setting up reserves on account of a liability because of their issuance, and that the

Jewel Tea Company quit issuing coupons in 1916, and that their coupons continued to come in for redemption at all times thereafter (4279-4286).

Whitworth: 4279-4286; 3458; 3469-3474;
Vincent: 2641; 3235; 3236, 3393; 3305; 3268-3275; 4270-4278; 3292-3296.

The L. P. Larson Jr. Company's Unclean Hands.

105.

We object and except to the failure of the Master to conclude that the Larson Company did not come into court with clean hands, and that it was therefore not entitled to recover any profits.

The Master should have found that the Larson Company was guilty of such fraud and deception as to disentitle it 403 to an award of profits in this case.

(See references in paragraphs 106-109 infra.)

106.

We object and except to the failure of the Master to find that the Larson Company asserted in its application for registration in the patent office, of its trade-mark "Wintermint," (Vol. II, original stenographic minutes of trial of main case before Judge Anderson, pp. 427-450, especially pp. 442, 443, 449, 450); and also in its answer and counterclaim filed in this case (printed transcript in first appeal of this case, p. 56); and in its affidavit filed in its orginal mandamus proceeding in 7 C. C. A. in this case (No. 2822), (printed transcript, p. 2) and in its testimony before the Master (bottom 1805 to 1916; 1787, 1788, 1796-1805), that it began to use gum under the "Wintermint" label as early as December 1913, and that such statement was false, and that the Larson Company sought to conceal its falsity by fasely pretending to have made a sale to a relative of L. P. Larson Jr. (the principal owner of and in control of the Larson Company) in December 1913, and to find by fraudulently altering its books and accounts and records to so show.

(A. R. 1772, 1773, 1777-1779; 1803; 1852; 1853; 2097; 2099-2101; 2105; 2113; 2356; 2378; 2345; 2350-2359; 2372; 2375; 2382; 2365-2366;)

404 107.

We object and except to the failure of the Master to find that the Larson Company sought to, and did, in fact, deceive the court in this case into erroneously believing that it had a growing and extensive business throughout the United States when the Wrigley Company first introduced its Doublemint, whereas, in fact the Larson Company never had but a trifling and nominal business in Wintermint, and its Wintermint sales had practically ceased before sale of Doublemint gum were well started.

(Larson Company's counterclaim at pp. 57, 59 of printed transcript of first appeal;

Mr. Aldrich's opening statement before Judge Anderson on the trial of main case. (Vol. I, stenographic copy of proceedings before Judge Anderson, p. 12.)

Testimony of Larson, Vol. II stenographic proceedings before Judge Anderson, pp. 577, 578;

Larson Company's main brief filed Aug. 2, 1917 in 7 C. C. A. on first appeal in this case, pp. 12, 13 and Larson Company's "Reply Brief" filed on first appeal herein Oct. 25, 1917, p. 3;

Affidavit of Larson filed in 7 C. C. A., April 23, 1920, Printed Transac. in mandamus proceeding, (pp. 52, 53, 62);

Botton A. R. 1805 to 1814; 427; 428; 7083-7091; Larson 7137; 7139; 7338; 7342; 2139-2143; 2150; 2240-2242; 7136; 2099; 2100; 2103; 2097;

Vol. II, stenographic proceedings of trial before Judge Anderson, Test. Caulfield, 549, 550;

Affidavit of Caulfield, Aldrich Exh. 3 for identification, 7355; 7356;

Larson, A. R. 1779-1781; 1805-1806; 1842; 1880-1881; 2324.

405 108.

We object and except to the failure of the Master to find that the Larson Company sought to deceive the public as to its identity, and as to the extent of the premises occupied by it, (1721-1729; 1754; 2176; 2177) and also sought, by false testimony, to prevent the Master from allowing the Wrigley

Company credit for its contingent liability with respect to its coupons, on the basis of a fifty-per cent redemption.

(2641; 3235; 3236; 3292-3295; 3268-3276; 3301-3306; 3347-3449; 4270-4278; Wrigley Exh. 12, Sheet A; 2618, 2640;

Whitworth: 3458, 3469; 3471-3474; 4279-4286; 4007; 4008; 6810-6813; 7327-7330; 7246; 7247; Wrigley Exh. 65, Stanley 31 (Rec. 6239); 3883-3885; 3849; 3850; 3887-3889.)

109.

We object and except to the Master's excluding (over the Wrigley Company's objections and exceptions) its offer to prove by L. P. Larson Jr. (7057-7063) that the Larson Company entered into a contract, over Larson's signature as President, with Thomas P. Tivy, in the summer of 1914, whereby Tivy agreed that, during the next five years he would purchase all the Larson Company's products, amounting to $89,700, during the first year of said contract and to $119,600 during the second year of said contract, and $143,000 dur-
406 ing the third year of said contract, and $171,600 during the fourth year of said contract and $205,920 during the fifty year of said contract (making a total of $729,820.00 for the entire five-year period), and by which contract the Larson Company agreed not to sell or cause to be sold any of its products without the consent of Tivy for a period of said five years and whereby Tivy agreed to pay the Company for its various products from $20 to $30 per case for chewing gum, consisting of two thousand packages of gum, each package containing five sticks, and whereby the Larson Company retained for itself only the right to sell its products during said five years within Cook County, Illinois and at the time of entering into said contract with Tivy the Larson Company had outstanding a contract with H. S. Vandervoort giving the latter the exclusive right to sell all of the Larson Company's products in Cook County, Illinois; and that said contract with Tivy further provided that on the expiration of the Larson Company's said contract with Vandervoort the Larson Company would not thereafter, within said five years, sell any of its products anywhere, even including Cook County, Illinois.

407 Additional Objections.

110.

We object and except to the Master's deducting from the gross profits the sum of only $2,292,605.66, instead of the sum of $5,205,762.81 (this sum being the $5,223,141.11 as shown by Wrigley Exhibit 92, Benington 1, Page 23, less Doublemint's proportion, $17,378.30 of additional income as shown by Wrigley Exhibit 92, Benington 21a and such sum is exclusive also of Federal Income and Excess Profits Taces and donations amounting to $621,108.97, and exclusive also of subscriptions and donations amounting to $28,740.38). (Wrigley Exh. 92, Benington 1, pp. 23, 23a).

111.

We object and except to the Master's finding and concluding (Report pp. 50, 51) that the profits on Doublemint gum during the accounting period were $2,860,083.66, and that said amount is due the Larson Company from the Wrigley Company, and to the Master's recommending that said sum, together with six per cent interest thereon from November 12, 1918, be decreed to be paid to the Larson Company by the Wrigley Company.

The Master should have found that no gains or profits accrued to the Wrigley Company from the manufacture and sale by it of its Doublemint gum in the enjoined dress during the accounting period, and he should have recommended the entry of a decree accordingly.

Rec. 5538-3540; 3543; 7613; 3493; 3671; 192-198; 3678; 6933; 833; 834; 843; 677; 678; 687; 905; 907.

408 112.

We object and except to the Master's not finding that the Larson Company never used any coupons or counterband coupon wrappers (1689; 7034), and concluding that the Wrigley Company should not be required to account for the gains and profits to it accruing or arising from the manufacture and sale of so much of its Doublemint gum sold during the accounting period, as was wrapped in coupon counterbands or wrappers which were redeemed by the Wrigley Company.

113.

We object and except to the Master's refusal (over the Wrigley Company's objections and exceptions) to consider the evidence of L. P. Larson, Jr. showing that neither he nor the Larson Company had the means, credit, experience, facilities, or ability to have made any of the sales of Doublemint gum which the Wrigley Company made during the accounting period, and that the Larson Company was unknown and never sold, or attempted to sell any Wintermint gum in Canada, Australia or in any other country foreign to the United States during the accounting period, and that it was unable and not in a position to sell any more gum during the accounting period than it actually sold, and that it and its Wintermint gum were entirely unknown throughout the greater part of the United States and of the territory in which the Wrigley Company sold the larger part of its Doublemint gum during the accounting period, and that the Larson Company never intended, or attempted to reach any of the territory in which, as aforesaid, no competition existed between the Larson Company and the Wrigley Company.

409 And we object and except to the refusal of the Master (over the Wrigley Company's objections and exceptions) to receive the evidence, and each and every part thereof, specifically referred to in each of the paragraphs (a), (b), (c) and (d) on page 3, 4 and 5 supra.

(7057-7063;)
(2222-2224;)

114.

We object and except to the Master's receiving (over the Wrigley Company's objections and exceptions) the evidence of L. P. Larson Jr. as to what occurred before Judge Carpenter on September 30, 1918, while an effort was being made to have a decree entered in this suit. (Rec. 8-12).

115.

We object and except to the Master's receiving (over the Wrigley Company's objections and exceptions) the testimony of Mrs. Loveless and the correspondence identified by her regarding the decree to be entered herein. (Rec. 12-25).

116.

We object and except to the Master's receiving in evidence (over the Wrigley Company's objections and exceptions) Larson Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9, and each thereof. (Rec. 8-25; 160-165).

410

117.

We object and except to the Master's not permitting the Wrigley Company to more fully examine Charles H. Aldrich as a witness regarding his interest in the pending litigation. (Rec. 7409-7414.)

118.

We object and except to the Master's refusal to permit the Wrigley Company to prove that for several years prior and up to July 28, 1914, the Wrigley Company advertised its Spearmint throughout the United States and its possessions and throughout Canada, Great Britain and Ireland, Australia, New Zealand, the West Indies, and part of South America. (Rec. 6240).

119.

We object and except to the refusal of the Master (6241-6262) to permit the Wrigley Company to prove the extent of the competition which it had during and at the end of the accounting period, in order to show the absolute necessity of the Wrigley Company's continuing its extensive advertising and other energies after the accounting period.

411

120.

We object and except to the refusal of the Master to permit the Wrigley Company to prove the quantity of its foreign sales of Doublemint gum from January 1, 1911, to July 28, 1914, and the countries in which they were made (7037).

121.

We respectfully request the Master to let the record show and also to find in his report that he received a letter

from the Larson Company's counsel dated January 18, 1919, containing the following:

"We would thank you to advise Mr. Hall that we do not wish, as at present advised, to contest the amount of Doublemint produced at the Chicago and Brooklyn factories, or the gross price received therefor by the Wrigley Company. The cost per box is in our judgment substantially correct. We, however, reserve the right to except to certain elements of cost entering into such average cost and for which we expect to claim credit. We continue our objections and exceptions to all items of charge against the gross profits arising from the manufacture and sale of Doublemint in the infringing dress during the period covered by accounting until we have finished the cross-examination of the officers and employes of the Wrigley Company, at which time we expect to advise the Master and opposing counsel in writing as to what item of charge claimed in the account filed we withdraw our exceptions and as to what items we continue to except."

And we further request the Master to let the record show and to state in his report that he did not receive any such written advice from the Larson Company's counsel, and, unless the Master complies with these requests we object and except to his failure so to do. (A. R. 228).

412

122.

We object and except to the Master's statements repeated throughout his report to the effect that the decree awards to Larson all gains and profits of the Wrigley Company accruing from the manufacture and sale of its Doublemint gum in the enjoining dress, and to his findings and conclusions that the court directs that all these profits should be awarded to Larson. (p. 42, line 3 from bottom; p. 43, line 2 from top; p. 44, line 16; p. 46, line 13; p. 46, line 3 from bottom; p. 48, line 5; p. 49, title; p. 49, line 3; p. 50, line 14; p. 50, line 17; p. 51, line 6; p. 52, line 3, second paragraph):

123.

We object and except to the refusal of the Master to receive the evidence offered by the Wrigley Company to prove that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, after June 15, 1915, was in any way misled or deceived into a belief that

such gum was not the product of the Wrigley Company but was the product of the Larson Company (7116).

124.

We object and except to the refusal of the Master to receive the evidence offered by the Wrigley Company to prove that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, after March 14, 1917, was in any way misled or deceived into a belief that such gum was not the product of the Wrigley Company but was the product of the Larson Company (7117).

413

125.

We object and except to the ruling of the Master (7656) in striking out and excluding the evidence of Nelson L. Buck showing the value of the patent and patent rights acquired by the Wrigley Company at the time of its incorporation (5525-6069; 6555-6646) and also to the Master's refusal to permit the Wrigley Company to substantiate said excluded evidence by L. P. Larson, Jr. (7020-7028).

126.

The finding of the Master that the gains and profits accruing to the Wrigley Company, or arising from the manufacture and sale of its Doublemint gum in the enjoined dress during the accounting period, amount to $2,860,083.66, is contrary to evidence.

127.

The finding of the Master that the gains and profits accruing to the Wrigley Company or arising from the manufacture and sale of its Doublemint gum in the enojoined dress during the accounting period, amount to $2,860,083.66, is contrary to the law.

128.

The finding of the Master that the gains and profits accruing to the Wrigley Company or arising from the manufacture and sale of its Doublemint gum in the enojoined dress dur-

ing the accounting period, amount to $2,860,083.66, is contrary to the law and the evidence.

414 In all of which particulars said Wm. Wrigley Jr. Company objects and excepts to said draft report, and submits and requests that the same ought to be varied and altered in accordance with the foregoing suggestions, objections, requests and exceptions, and objects and excepts to each and every failure of the Master to comply therewith.

WM. WRIGLEY JR. COMPANY,
ISAAC H. MAYER,
By WALLACE R LANE,
Its Solicitors.

ISAAC H. MAYER,
WALLACE R. LANE,
Solrs. of counsel.
Chicago, October 31, 1923.

Filed Nov. 13, 1923, at ..... O'clock ..... M. John H. R. Jamar, Clerk.

415 And on to-wit: the 3rd day of December, A. D. 1923, there was filed in the Clerk's office of said court a certain Exceptions to Master's Report, in words and figures following to-wit: Filed Dec. 3, 1923.

416 * * * No. 488 * * *

WM. WRIGLEY JR. COMPANY'S EXCEPTIONS TO THE MASTER'S REPORT.

Now comes the Wm. Wrigley Jr. Company, plaintiff and defendant to counterclaim, and excepts to the report of Charles B. Morrison, Esq., (the Master in Chancery to whom this cause was referred on October 14, 1918) filed in this cause on the 13th day of November, 1923, and for cause of exception says:

First: That the Master in said report has taken an account of all gains and profits of the Wm. Wrigley Jr. Company (sometimes herein referred to as Wrigley Company, or Wrigley) to it accruing from the manufacture and sale of its Doublemint gum from July 28, 1914, to the end of the accounting period;

Whereas he should have complied with the decree which

ordered him to take an account of the gains and profits of the Wm. Wrigley Jr. Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined during the accounting period, and the master should have found—

(a) That the L. P. Larson Jr. Company (sometimes herein referred to as Larson Company, or Larson), in the accounting proceeding before the Master has made no attempt to prove, nor is there any testimony to show that
417 any gains or profits were made by the Wm. Wrigley Jr. Company in connection with its manufacture and sale of Doublemint gum during the accounting period on account of the use of the enjoined dress, or that it was impossible or impracticable to separate or apportion profits arising out of the use of this enjoined dress by the Wm. Wrigley Jr. Company from profits which arose otherwise, or from the manufacture and sale of that gum if otherwise dressed, or that any profits were diverted from the L. P. Larson Jr. Company by the Wm. Wrigley Jr. Company on account of its enjoined dress; and the master should have concluded that the burden was upon the Larson Company to make such proof before any recovery can be had herein by the Larson Company against the Wrigley Company; and the Master should further have found—

(b) That the L. P. Larson Jr. Company in the accounting proceedings before the Master has made no attempt to prove, nor is there any testimony to show that any sale of Wrigley's Doublemint gum during the accounting period was ever made to purchasers who were mislead into buying Wrigley's Doublemint gum as and for Larson's Doublemint gum, or that there was any likelihood of any such purchasers being so mislead; or that the L. P. Larson Jr. Company lost any sales or profits, or that the Wm. Wrigley Jr. Company derived any profits or gains because any purchasers, immediate, intermediate or ultimate, bought Wrigley's Doublemint gum as and for Larson's Wintermint gum; and the Master should have concluded that the burden was upon the Larson Company to make such proofs before any recovery can be had herein by the Larson Cmpany against the Wrigley Company; and the Master should further have found—

(c) That the Wm. Wrigley Jr. Company at all times, conspicuously and consistently, by its advertising, by marking its individual sticks, packages containing five sticks, and boxes in which it shipped its Doublemint gum, with its own

name, W. Wrigley Jr. Company, and generally with its
418 own name as manufacturer thereof, so distinguished its Doublemint gum that all purchasers thereof could easily distinguish this product as the product of the Wm. Wrigley Jr. Company; and that there was no likelihood of any purchasers buying Wrigley's Doublemint gum so marked and advertised, as the product of the L. P. Larson Jr. Company; and that the Wm. Wrigley Jr. Company derived no gains or profits because of the enjoined dress.

Eckerly:* A. R. 7068; 7069; 7079-7081; (Wrigley Exhibits 72-90, inclusive, 6857-6866; 6868-6878); 6881-6887; 7070-7094; 7097-7099; 7105-7131;
Larson: 2240; 2247-2248;
Stanley: 6240.

Second: That the Master, in the trial of the cause refused, (A. R. 7073-6) on objection of the L. P. Larson Jr. Company, and over the exceptions of the Wm. Wrigley Jr. Company,** to receive the testimony offered by the Wm. Wrigley Jr. Company to prove by competent witnesses having knowledge of the facts, and by other evidence, (and with the admission of L. P. Larson Jr. Company's counsel that each of such witnesses might be considered as present in court for this purpose, A. R. p. 7103, 7106), and which testimony, if received, would have proven:—

(a) That none of the purchasers, immediate, intermediate or ultimate, of Wrigley's Doublemint gum in the enjoined dress during the accounting period, was misled or deceived in purchasing Wrigley's Doublemint gum, but purchased Wrigley's Doublemint gum because each of them desired and preferred this product of the Wm. Wrigley Jr. Company; and taht the Wm. Wrigley Jr. Company has never palmed off, nor attempted to palm off, nor have any
419 purchasers bought any of Wrigley's Doublemint gum as and for Larson's Wintermint gum, or any product of the L. P. Larson Jr. Company.

Masters' Ruling: 7073-6; 7099; 7100;
Eckerly: 7076-7118; 7068-7071; 6881; 6884-7;
Williams: 7118-7125;
Hackanson: 7118; 7125-7;

---

*A. R. and all record references (unless otherwise stated) refer to Accounting Record before the Master.

**A. R. 283, Stipulated that parties shall automatically have an exception to every adverse ruling.

Chapman: 7118; 7127-7130;
L. P. Larson Jr. and others: 7112-7118; 7034; 7035; 1808-1814; 2100; 2222-4; 3398, 9; 4132-4; 7057-63;
Stanley: 6807-9;
Mr. Aldrich's admission (1790) that Larson Company sold no Wintermint gum in Canada or Australia before, or during accounting period.
Wrigley Exhibit 92, Benington 19;

(b) (1) That during the entire accounting period the Larson Company and its Wintermint gum were each unknown in Canada, Australia and all countries foreign to the United States and in most places in the United States where Wrigley's Doublemint gum was sold during said period (7112; 7114-6; 7104, 5; 1790).

(3) That the territory occupied by the Larson Company in the sale of its Wintermint gum, and that of the Wrigley Company in the sale of its Doublemint gum, was largely noncompetive (1790; 7112-14).

(3) That the selling price charged by the Wrigley Company for its Doublemint gum was never less, but generally more than the price charged by the Larson Company for its Wintermint gum (7112).

(4) That substantially all Wrigley's Doublemint gum sold during the accounting period was in territory where Larson's Wintermint gum was unknown and had never been sold. (See references under Exception Second (b) (1), (2), supra).

(5) That none of the sales by the Wrigley Company or any of its jobbers, dealers or users, was made with the intent, desire, design, or purpose of forestalling the Larson Company, or the sale of its Wintermint gum (7110; 7111; 7113-6; and references under Exception First (c).

420 (6) That neither L. P. Larson, Jr. nor the L. P. Larson Jr. Company had the means, credit, facilities, or ability, at any time during the accounting period, to have procured supplies to do more business than they did, or to have done more business than they did, or to have sold Wintermint gum throughout any substantial portion of the territory in which the Wrigley Company sold its Doublemint gum or to have filled orders for Wintermint gum in the quantities that the Wrigley Company sold its Doublemint gum during the accounting period (7113; 7114).

(7) That the Larson Company made no attempt to sell its Wintermint gum previous to or during the accounting

period in any substantial amount or proportion of the territory where Wrigley's Doublemint gum was sold. (7115; 7116; 7112; and references under Exception, second, (a), supra.

(c) And also that exact territory in which the Wrigley Company, its jobbers, retailers and dealers, sold Wrigley's Doublemint gum during the accounting period, and the exact territory where the Larson Company sold its Wintermint gum, or did any other business, at all times previous to and during the accounting period, and when each of them respectively commenced the sale of its products and the exact place and extent thereof; all of which was duly excepted to by the Wrigley Company at the time, as appears of record.

7073-6; 7099; 7100; 7083-7094; 7112-7118; 7118-7130; 1808-1814; 2100; see, also, references under Exception, Second, (a), supra.

(d) Whereas the Master should have received and considered all said offered and rejected testimony of the Wrigley Company, and every part therof, and have found therefrom

(1) That all of the sales of Wrigley's Doublemint
421 gum in the enjoined dress, during the accounting period, and all profits and gains derived by it therefrom, were made because of and were due to the reputation and distinctive advertising of the Wrigley Company, its plain marking of all sticks, packages and boxes of Doublemint gum conspicuously with its own name, and in most instances with its own name as manufacturer thereof.

(2) That none of the sales of Wrigley's Doublemint gum, or profits or gains derived therefrom were in any way made or influenced by the enjoined dress, and that the Larson Company is not entitled to any of the gains or profits of the Wrigley Company on account of its manufacture and sale of Doublemint gum in the enjoined dress.

Third: (a) That the Master, in the trial of the cause, refused (7116), on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and with the admission of Larson Company's counsel that each of said witnesses might be considered as present in Court for this purpose, 7103, 7104, 7106) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's

Doublemint gum, at any time during the accounting period after June 15, 1915, (the date the Wrigley Company filed its bill of complaint herein) was in any way misled or deceived into a belief that such was not the product of the Wrigley Company, or that it was the product of the Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company.

422 (b) That the Master, in the trial of the cause, refused (7117). on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and with the admission of Larson Company's counsel, that each of such witnesses might be considered as present in court for this purpose, 7103, 7104, 7106) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, at any time during the accounting period after July 6, 1915 (the date on which Larson's counterclaim was filed) was in any way misled or deceived into a belief that such gum was not the product of the Wrigley Company, or that it was the product of the Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company.

(c) That the Master, in the trial of the cause, refused (7117), on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and with the admission of Larson Company's counsel that each of such witnesses might be considered as present in Court for this purpose, 7103, 7104, 7106) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, at any time during the accounting period after March 14, 1917, (the date Judge Anderson dismissed Wrigley's bill and Larson's counterclaim) was in any way misled or deceived into a belief that such was not the product

of the Wrigley Company, or that it was the product of the
423 Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company.

Fourth: That the Master erred in excluding the offered evidence referred to heretofore and in his conclusion (7073-6; Report pp. 42, 53) that he was precluded from receiving said evidence by the second decision of the Circuit Court of Appeals herein.

Fifth: That the Master has in said report (pp. 2, 3) stated:—

(a) That the bill of complaint filed herein by the Wrigley Company on June 15, 1915, alleges that confusion existed and would continue between the Wrigley Doublemint package and the Larson Wintermint package;

Whereas, the Master should have found that said bill of complaint merely avers, upon information and belief, the likelehood of confusion and that the same was due to the conduct of the defendants to said bill. (See bill of complaint, paragraph IX and X. The same will be found at page 41, 42 of printed transcript of record in 7th C. C. A. on first appeal in Numbers 2498 and 2500), and the Master should also have found that the answer which the Wrigley Company filed to the Larson Company's counterclaim expressly denies that any confusion has resulted between said Doublemint and Wintermint packages. (See answer to counterclaim at pp. 75, 76 of printed transcript filed in 7th C. C. A. on first appeal.)

(b) The Master in said report (pp. 2, 3) has further stated that the Larson Company, in its answer and
424 counterclaim, prayed for an injunction and accounting;

Whereas, the Master should have found that said answer and counterclaim prayed an accounting of profits only insofar as they were diverted from said Larson Company and arose out of infringing acts, and that said answer and counterclaim also prayed that said Wrigley Company account for and pay over all damages sustained by said Larson Company by reason of such infringement and unlawful acts. (See said answer and counterclaim, p. 63 of said printed transcript).

(c) The Master in said report (p. 42) further stated that the Court of Appeals, in its decision in this case, directed the entry of a decree "granting an injunction and awarding to

Larson the profits made on the Doublemint business," and (p. 53) decided "the question of the Larson Company's right to profits made in territory where competition did not exist;"

Whereas, the Master should have concluded that the Court of Appeals did not decide, or pass upon the question as to what, if any, profits the Larson Company is entitled to recover from the Wrigley Company, and did not make any award of any profits made on the Doublemint business.

(d) The Master in said report also stated and concluded (p. 46, line 13) that the decree referring said cause to him "awards to Larson all gains and profits of Wrigley accruing from the manufacture and sale of its Doublemint gum in the infringing dress," and (p. 46, line 3 from bottom) that "the court directs that the profits be awarded to Larson and does not authorize any deduction to be made therefrom," and also (p. 52, lines 14-17) that "the decree requires the Master to award to Larson all profits on Doublemint sold in the infringing dress and he is not authorized to make any deduc-
425 tions therefrom," and the Master makes similar statements and conclusions in his report at p. 43, line 2; p. 44, line 16; p. 48, line 5; p. 49, Title, and line 3; p. 50, line 14; and the Master has also stated and concluded in said report, (pp. 42, 53, A. R. 7073-6, 7094) that the Wrigley Company is forbidden by said decision of the Circuit Court of Appeals from deducting from the profits and gains, if any, accruing to the Wrigley Company from the manufacture and sale of it Doublemint gum during the accounting period, any such profits and gains, even if they resulted from causes other than the use of the enjoined dress;

Whereas, the Master should have found and concluded that said decree does not make any award at all and that neither said decree nor said decision of the Court of Appeals forbids the Master from making any deductions from the profits and gains of the Wrigley Company accruing from the manufacture and sale of its Doublemint gum in the infringing dress; and the Master should also have found and concluded that he was directed and authorized by said decree to ascertain what portion of said gains and profits during the accounting period arose from, or was due to the use of said enjoined dress, and what portion arose from or was due to causes other than said enjoined dress; and the Master should further have found and concluded that the question of whether or not any award shall be made in this case to the Larson Company has not been decided by any court and is still an open one,

and that he was authorized and required by said decree to deduct from the sales, gains and profits of Doublemint gum to be accounted for herein such as did not result, or arise from the use of the enjoined dress, and that the Wrigley Company, if liable at all, is liable for only such profits and gains as resulted from, or were induced by the Wrigley Company's use
of the enjoined dress, and the Master ought to have re-
426 ceived the evidence offered on that subject by the Wrigley Company, and said evidence, if received, would have proven that no profits or gains were due to, or resulted from the Wrigley Company's use of the enjoined dress during the accounting period.

Sixth. That the Master should have stated and found:

(a) That the only similarity claimed by the Larson Company to have caused confusion between Wrigley's Doublemint gum and Larson's Wintermint gum was caused by the green wrappers around the individual sticks (Larson Company's original brief on first appeal, 7 C. C. A., pp. 24, 25, and pleadings); and

(b) That the Larson Company failed to prove and that the record fails to show that any profits or gains were derived by the Wrigley Company on account of its thus wrapping its individual sticks of Doublemint gum, or from the sale thereof, and the Master should have concluded that the Larson Company is therefore not entitled to any profits or gains, or to any awards thereof under the decree herein.

Seventh. The Master has, in said report (47, bottom p. 50, 51) stated and concluded that the gains and profits accruing to the Wrigley Company, or arising from the manufacture and sale of its Doublemint gum in the enjoined dress during the accounting period, amounts to $2,860,083.66, and he has recommended that said sum, together with interest thereon at six per cent from November 12, 1918, be decreed to be paid to the L. P. Larson Jr. Company by the Wm. Wrigley Jr. Company;

Whereas, said conclusion and recommendation is wholly unsupported by and is contrary to the evidence and the law, and the Master should have found and concluded that no gains or profits have accrued or arisen to the Wrigley Company from the manufacture and sale of Doublemint gum in the enjoined dress, and that no gains or profits resulted from, or were
induced by the use of the enjoined dress, and the Master
427 should have recommended the entry of a decree accordingly, and, instead of the Master's deducting from

Doublemint's gross profits the sum of only $2,292,605.66, the master should have deducted the sum of $5,205,762.81 (this sum being the $5,223,141.11 as shown by Wrigley Exhibit 92, Benington 1, page 23, less Doublemint's proportion, $17,378.30 of additional income as shown by Wrigley Exhibit 92, Benington 21 and such sum is exclusive of Federal Income and Excess Profits Taxes amounting to $621,108.97, and exclusive also of subscriptions and donations amounting to $28,740.38). (Wrigley Exh. 92, Benington 1, pp. 23, 23a.)

See references in Exceptions First, (c): Second, (a), (b), (c); Third; Fifth; Sixth; Eight; Ninth; Eleventh, (b), (b) (2), (e), (f), (h), (i), (l), (m), (q), (r), (t); Twelfth to Twenty-third, incl.)

Eight. (Doublemint Gum Bearing Legend That It Was Made by the Wm. Wrigley Jr. Company.)

That the master has, in said report, stated and concluded (p. 52) that he is not authorized to make any deductions from the sales of Wrigley's Doublemint gum wrapped in counterbands bearing the legend:

"Made by the Manufacturers of the famous
Wrigley's Spearmint
Wm. Wrigley Jr. Company,
Chicago New York
Toronto London."

Whereas, the master should have found and concluded

(a) That the Wrigley Company is not liable for any gains or profits to it accruing or arising from the manufacture and sale of Doublemint gum wrapped in counterbands bearing said quoted legend, and also that, as is shown by the evidence, there were no gains or profits accruing to the Wrigley Company, or arising from its manufacture and sale, during the accounting period, of its Doublemint gum enclosed in wrappers which did not bear said quoted legend.

Wrigley Exhibit 92, Benington 19; Rec. 6988;
Benington: 6983-6991;
Eckerly: 6857-6888; 6991-2; 7068; 7069;
Wrigley's Exhibit 72 to 90 both inclusive (6858-6878).
Larson's wrappers, 2240.
Wrigley Exhibit 92, Benington 16; Stanley: 6962-5.
Offers to prove: 7091-7094; 7113-18; 7098-7106; 7073-6.

428 (b) (1) That the sales, during the accounting period, of Wrigley's Doublemint gum in the enjoined dress which was wrapped in counterband wrappers bearing said quoted

legend, amounted to $8,639,126.45, and that the sales, during said period, of Doublemint gum in the enjoined dress which was wrapped in counterbands not containing said quoted legend, but was plainly marked with the name Wm. Wrigley Jr. Company, amounted to $278,160.45 (Wrigley Exhibit 92, Benington 19, Statement 1), and that the sum of these two amounts, ($8,917,286.90) represented the total Doublemint gum sales during the accounting period and was accepted by the Larson Company as correct (Wrigley Exhibit 92, Benington 1, p. 23); and that the Wrigley Company made no profits or gains from said sales of said Doublemint gum amounting to $278,160.45; and

(2) That no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum bearing said quoted legend, could have been, or was in fact deceived into believing that said gum was not made by the Wm. Wrigley Jr. Company, or that it was made by the L. P. Larson Jr. Company; and

(3) That there were no profits or gains derived on account of the enjoined dress, as distinguished from other causes. (See references under Exception Eight (a), supra; First, (c); Second, (a), (b), (c), supra; Third, supra.

Ninth. That the Master refused to sustain the following objections, and each thereof, made by the Wrigley Company at the time of filing its accounts herein (and continuously insisted upon by the Wrigley Company throughout the accounting period) viz:

429 (a) That the Master's order is not warranted by the record, or by the decree of reference;

(b) That no sales of Doublemint were made by the Wrigley Company except under its own name as manufacturer and in boxes and wrappers plainly identifying such Doublemint as Wm. Wrigley Jr. Company's product, and that no gains or profits have accrued to the Wrigley Company by reason of this Doublemint gum having been sold in said dress, labels or wrappers, except as said dress, labels or wrappers identifies said product with its name, reputation and advertisement, and which gains and profits would equally have accrued to the Wrigley Company if said Doublemint had been sold in dress, labels or wrappers corresponding in all respects (except its registered trade name Doublemint and its registered trade mark double spear) with those used by the Wm. Wrigley Jr. Company, and identified with its reputation, when the product

of the L. P. Larson Jr. Company was first placed upon the market, and for many years prior thereto;

(c) No Doublemint was sold as, or confused with the Larson Company's Wintermint, or any of its products;

(d) That so far as the Wrigley Company knows, or is able to ascertain, none of its packages of Doublemint gum was ever sold or bought as the product of the L. P. Larson Jr. Company, but was all sold and bought exclusively as the product of the Wrigley Company (Objections attached to Wrigley accounts filed December 3, 1918, December 10, 1918, and March 6, 1919, A. R. 166-176).

Whereas, the Master should have found and concluded that the Wm. Wrigley Jr. Company should not be compelled to account to the Larson Company for any of the profits or gains of its Doublemint gum until it had shown the existence of profits or gains due to the enjoined dress, or the impossibility of segregating such profits and gains, if any, from those 430 due to other causes.

Tenth. (a) That the Master has in said report (p. 9) compared the Wrigley Company's "total sales" and its "Doublemint sales," and used the "percentage of Doublemint to total sales," so ascertained, in arriving at his conclusions;

Whereas, the Master should have distinguished Doublemint sales to purchasers, immediate, intermediate and ultimate, who were not deceived, from Doublemint sales, if any, resulting from purchasers accepting Wrigley's Doublemint gum as and for Larson's Wintermint gum; and the Master should also have found that there was no proof of any sales, profits or gains arising from, or due to the use of the enjoined dress; and that there was no sufficient proof to justify any award of profits or gains to the Larson Company. (See references under Exception Seventh.)

(b) That the Master has in said report (p. 9) found and stated the gross profits of the Doublemint business in the accounting period to be $5,152,689.32;

Whereas the evidence showed and the Master should have stated and certified that in arriving at the amount of said "Gross profits" he has not taken into consideration but refused to receive evidence offered by the Wrigley Company which, if received, would have proven (1) sales of Doublemint gum, and the extent thereof, to purchasers, immediate, intermediate and ultimate, who knew they were buying products of the Wm. Wrigley Jr. Company when they were purchasing Wrigley's Doublemint gum; and, (2), sales of Doublemint

gum, and the extent thereof, in territory where there was no competition or likelihood of competition between the Larson Company and the Wrigley Company; and (3), sales of Wrigley's Doublemint gum not made because of any confusion in
the minds of the purchasing public of Doublemint gum
431 with the Larson Wintermint product, or any other prod-
uct of the Larson Company, and the extent thereof. (See references under Exception First, (c); Second,

Deductions.

Eleventh. (Advertising, Report, pp. 10-20)

Without waiving, but specifically insisting upon each and every one of the preceding exceptions to the report of the Master, and excepting to the findings of fact and conclusions of law in his report concerning the amount of gains and profits of the Wrigley Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the hereinbefore enjoined dress, the Wrigley Company further excepts to the Master's findings and conclusions concerning the hereinafter referred to items and matters, and for cause of exceptions says:

(a) That the Master has, in said report, allowed a deduction for the Wrigley Company's advertising in connection with its sale of Doublemint gum during the accounting period, of only $996,127.45 (report p. 20), an account which is wholly unsupported by the testimony and was arrived at by the Master by an undisclosed method; and the Master refused, though requested so to do (Wrigley's "Objection, Exhibit A," No. 40, p. 38) to state or certify in his report, from what testimony or exhibits, or how he arrived at his said finding and conclusion;

Whereas, the evidence showed and the Master should have found that the Wrigley Company's advertising, (as illustrated in the seven books of advertising produced before the Master, Larson Exhibits 30-36, inclusive,) referred to the various
brands advertised, and was solely designed and intended
432 to advertise and sell and resulted only in the sale of the
products of the Wrigley Company specifically referred to or pictured in such advertisements; and that the unrefuted testimony of a large number of competent, credible witnesses clearly shows that the space or prominence basis is the proper and fair method for allocating advertising in this case to arrive at the cost thereof and the amount to be deducted

from Doublemint's gross profits, and is properly arrived at (Wrigley Exh. 65, Stanley 11 (A. R. 6102), Wrigley Exh. 92, Benington 1, pp. 4, 23, 25) by measuring each advertisement separately and using the following method of allocation, namely—

(1) Where the advertisement specifies only Doublemint, charging the entire cost thereof to Doublemint; and

(2) Where the advertisement specifies Doublemint together with one or more other brands, charging each brand named therein with the cost of the exact space occupied by that brand in the advertisement, whether by a picture of the package, or by a logotype, or by any other matter referring to the specified brand, and charging among the brands named in the advertisement the balance of the cost in the proportion which such space bears to the total space occupied by all packages, logotypes, and any other matter referring to the specified brands.

(b) That the Master has in said report (p. 14) found and stated that it is impossible to divide advertising cost with reasonable accuracy according to the space occupied and (p. 13) that the name "Wrigley's," the spears and spearmen, and the descriptive literature relating to the business are so commingled with brand advertising that an accurate division of brand and institutional advertising cannot be made and that unless some method can be found that enables a substantially accurate separation, the conclusion is coerced that by 433 reason of admixture, institutional and brand advertising are inextricably commingled;

Whereas, the evidence showed and the Master should have found that the name "Wrigley's," howsoever displayed or appearing in the advertisements, the spears and spearmen, the pictures, general language and the descriptive literature relating to the business, all draw attention to and advertise only the specific brands mentioned in such advertisements and that the sole purpose thereof is to sell the brands advertised;

Stanley: 769; 770; 861; 862; 7609; 789; 790; 1210;
Schott: 4319-4324; 4288-4314; 5189; 5190; 4340; 4341; 4329; 4330; 4334; 4337; 5193; 5195-6.
Rowley: 4520; 4521; 4507-30; 4537, 4538;
Rieck: 4645-8; 4632-4644; 4656-78;
Hart: 4366; 4348-4355; 4371-4373; 4409-4411; 4360-4368; 4375; 4396-8; 4401-2; 4407;
Botz: 4843; 4908; 4850; 4893-5; 4821-4851; 4858; 4861;

Lebair: 4972-4; 4910-4935; 4949; 4953; 4969; 4979, 4980, 4956;
Toms: 4431; 4432; 4425-35; 4414-27; 4494; 4498-4502; 4436; 4466-7;
Kraus: 4227-9; 4233-6; 4224-6; 4232-4238; 4178-4198;
Benington: 6958; 7262; 7263; 7268; 7290-1;
Mace: 4573-6; 4551-4568; 4622-6;
Larson Exhs. 30-36 (both incl.)

and the evidence further showed and the Master should have found that it is possible in this case to divide the advertising cost with reasonable accuracy on the space basis, and that the Wrigley Company has, in fact, made an actual and accurate measurement of each advertisement, separately, for which it is seeking credit in this case, and that it has actually and accurately ascertained and proven, separately, the following:

(1) The entire cost of all its advertisements during the accounting period, which specified Doublemint gum only.

Wrigley Exh. 65, Stanley 20 (6112-6114).

(2) The entire cost of the exact space occupied in each of its advertisements during the accounting period, by the Doublemint brand, whether by a picture of the package or by a logotype, or by any other matter referring to the Doublemint brand.

434 And the evidence showed and the Master should also have found that an accurate separation of brand and institutional advertising can be and has in fact been made by the Wrigley Company. (Wrigley Exh. 65, Stanley 1-20 both inclusive.)

Hagberg: 3373; 3359-60; 3367-73; 3394, 5;
Vincent: 3004-3007; 3016; 3017; 3281-3284; 2730-2733; 3326; 3327; 2783; 3360; 3032;
Stanley: 6077-6114; 1131; 6272-6314; 6430-60; 6256-67; 7609; 6232-7; 595-609; 790; 725, 6; 802-804; 915-942; 873-898; 841-868; 6335-6342; 6464-8; 655; 656; 638-640; 762-768; 967; 645; 646-648; 6071-6237; 1130; 6243-5; 6321-9;
Downey: 6404-6421;
Stewart: 6347-6366;
Hylleberg: 6380-6404;
Fisk: 6422-6424;
Gans: 6424-6425;
Eckerly: 124, 125;
Paine: 128; 129; 139-140; 2561-3; 2570; 2572;
Cox: 65-66;

Benington: 6902-6903; 7254; 7255;
Whitworth: 3159-61;
Wrigley Exh. 65, Stanley 1-20 (incl.);
Larson Exh. 139 (3495);
Larson Exh. 151 (3796; 3797);
Larson Exh. 168 (6428);
Wrigley Exh. 92, Benington 1, pp. 3, 4, 5, 6, 25;
Larson Exh. 24;
Freeman: 3495; 3496.

and the evidence showed and the Master should also have found that the actual cost to the Wrigley Company of advertising its Doublemint gum during the accounting period amounts to $2,872,844.43, and that the Wrigley Company has accurately measured and arrived at accurate results of the cost of said advertising based upon alternative methods, as shown in Wrigley Exh. 65, Stanley 2 (6079); Wrigley Exh. 65, Stanley 16 (6016); Wrigley Exh. 65, Stanley 7 (6097-6099); Stanley: A. R. 6071-6237; 7609; and that each of said methods shows, with reasonable and sufficient accuracy, the actual amount spent by the Wrigley Company in effecting its sale of Doublemint gum through advertising it during the 435 accounting period.

(c) That the Master has in said report stated and found (bottom pp. 12, 13) that the name "Wrigley's" was the dominating feature in all display advertising during the greater part of the accounting period, and that the general language of the advertisements referred to the name "Wrigley's," rather than to the brands advertised;

Whereas, the evidence showed and the Master should have found:

(1) That the more prominence given the name "Wrigley's" in any advertisement referring to or picturing one or more brands, the greater is the value of such advertisement in selling the brands referred to or pictured therein; and that the general language of such advertisements refers to the brands advertised therein, and is used for the sole purpose of selling such brands and securing profit therefrom.

See references under Exception, Eleventh, (b), p. 18, supra.

(2) That the Wrigley Company's advertising one brand does not benefit, but rather decreases sales of a non-advertised brand.

Stanley: 868-870; 762; 763; 766-770; 787; 794-6; 798-800; 842; 843; 3493; 3671; 656; 954-960;

Mace: 4576-4580;
Hart: 4367; 4368;
Rieck: 4649; 4656; 4671;
Botz: 4846; 4847; 4887;
Toms: 4432-4;
Lebair: 4961-2;
Rowley: 4547; 4549; 4550.

(3) That none of the advertising done by the Wrigley Company during the accounting period which refers to or pictures a brand, is institutional advertising, but that all such advertising was solely designed and intended to advertise and sell, and resulted only in the sale of the products of the
436 Wrigley Company specifically referred to, or pictured in such advertisements.

See references under Exception, Eleventh, (b) p. 18 supra.

(d) That the Master has in said report (pp. 15-17) stated and certified certain percentages of so-called institutional advertising in each class of advertising, and deducted the same from the total of each class and divided the remainder among the brands advertised on the basis of their relative sales, and treated as institutional the percentages and the amounts found and certified by him at page 17 of his report;

Whereas, there is no evidence to support said findings and conclusions, or any thereof, but the evidence showed and the Master ought to have found that all the advertising which the Master treated as institutional was, in fact, not institutional, but brand advertising.

See references under Exception, Eleventh, (b), p. 18, supra.

(e) That the Master has in said report (pp. 14-16) stated and found that the advertising which he found to be institutional should be amortized, and that four years is a reasonable period for such amortization;

Whereas, the testimony conclusively shows and the Master should have found that (1) all the advertising expenses incurred by the Wrigley Company during the accounting period should be charged, at the time the expense is incurred, on a space or prominence basis, and that no portion thereof should be deferred, capitalized, treated as an asset, or amortized:

Freeman: 3679-3682; 3849; 3850; 4594; 4595; 2619-2624; 3499; 3502; 3734-3742;
Aldrich: 2618-2625;

Mace: 4551-4583; 4594-4597; 4601-4603; 4614-4616; 4621-4630;
Toms: 4414-4454; 4426; 4460-4462; 4468; 4478;
Botz: 4843; 4849-4851; 4821-4851; 4895; 4900-4901; 4880; 4843-4849;

437 Benington: 6954-6956; 7330-7331; Wrigley Exh. 92, Bennington 1, p. 10; 7290-7291; 7275;
Stanley: 764; 765; 771; 7393; 7528; 7538;
Lebair: 4910-4939; 4958-4959; 4968-4970;
Rieck: 4632-4650; 4677; 4638-4639; 4656;
Hart: 4347-4373; 4380; 4394;
Rowley: 4507-4531; 4521;
Kraus: 4178-4239; 4183-4; 4238; 4226-4229; 4242; 4249;
Schott: 4288-4324; 4325; 5200-5202; 4298; 4317-4320.
Vincent: 3318; 2753; 2755; 3320; 2897, 8; 2908-2911; 3048; 3054; 3057; 3355; 3356;
Hagberg: 3386-7; 3390-3391; 3167; 3364-3366;

(2) That even if the Wrigley Company's advertising during the accounting period had any deferred value at the end of the accounting period, it would not be recoverable under the decree, and also that such value could not be measured, and that it is uncertain, indefinite and conjectural;

Lebair: 4960-4961;
Toms: 4473; 4502-3; 4461-2; 4468;
Schott: 5200, 5201; 4346; 4326;
Mace: 4575-4577; 4597; 4630;
Botz: 4899-4903; 4871; 4906-7; 4874;
Rieck: 4676; 4677;
Rowley: 4536;
Kraus: 4184-6; 4248; 4249; 4256;
Hart: 4378-4379;
Benington: 7226; 7228-7231; 6954-5; 7218-7219;
Larson Exhibit 132, pp. 11-12.

(3) That advertising a brand must be continued, otherwise its sales will immediately fall off and will quickly disappear:

Rowley: 4524; 4525;
Hart: 4372;
Botz: 4844; 4847-4848; 4887;
Kraus: 4184-6;
Stanley: 764; 765; 767; 768; 868-870; 793-800; 954-960; 905-907; 913; 915; 833; 843; 3493; 3671; 6241-2;

Rieck: 4650;
Schott: 4317; 4318; 5200; 5201;
Mace: 4606; 4577-4581;
Lebair: 4942, 4.

(f) That the Master has in said report found and concluded that the Wrigley Company's advertisements of Doublemint gum during the accounting period advertised the
438 Wrigley Company's entire business or institution, as well as the Doublemint gum, and had an unexpended value at the end of the accounting period;

Whereas, there was no evidence to support such a finding, but the evidence showed and the Master should have found that, if the Wrigley Company retained anything of value in connection with its business, or its Doublemint gum, or its right to use the name "Wrigley's" and the name "Doublemint", (which the Wrigley Company admittedly at all times had the right to use and in which the Larson Company had no interest) at the end of the accounting period because of the business or advertising done by it during the accounting period, or because of anything charged by it or allowed to Doublemint in this accounting, then the Doublemint gum sold by the Wrigley Company during the accounting period had an equal or greater benefit and advantage by reason of the advertising done by the Wrigley Company prior and up to the commencement of the accounting period and because of the extensive advertising of the name "Wrigley's," "Wm. Wrigley Jr. Company," and the name "Doublemint", during the accounting period, and also by reason of the plant, equipment, organization and reputation which the Wrigley Company placed at the disposal of and used in connection with the Doublemint business at the beginning of the accounting period.

A. R. Stanley: 770-1; 833-6; 905; 967; 844; 3671;
Wrigley Exh. 92, Benington 1, pp. 9, 10, 28, 27;
Benington: 7283-7284;
Mace: 4579;
Larson Exh. 153 (3822, 3830-3);
Larson Exh. 145-a (3745);
Larson Exh. 152 (3821);
Larson Exh. 132, pp. 10, 11;
Larson Exh. 138 (3493);
Larson Exh. 148, Sheet 3 (3671);
Wrigley Exh. 107 (7613);
Whitworth: 3435.

(g) That the Master failed and refused to conclude as a matter of law that the burden was on the Larson Company of proving that the Wrigley Company's advertising during the accounting period created a so-called institutional value, if any exists, and that the Larson Company did not sustain such burden of proof and that it should not be allowed any amount on account thereof.

439 (h) That the Master has in said report (pp. 15, 16) stated and found that the contention against the sales method,—that sales do not always respond in proportion to the advertising expended and especially where a new article or brand like Doublemint is placed on the market,—could be advanced if the Wrigley Company had ceased to sell gum under the name of Doublemint at the close of the accounting period, but as it continued to use the name Doublemint, it is fair to assume from its experience with other brands that the returns on Doublemint will finally, fully recompense it for the advertising cost;

Whereas, the evidence shows and the Master should have found and concluded:

(1) That the sales of Doublemint do not properly reflect the expense of advertising it, and that it is illogical, unfair and improper to allocate advertising expenses in this case on a sale basis.

Stanley: 752, 753, 763-768;
Mace: 4580-4582;
Hart: 4373, 4380;
Schott: 4314-4316;
Rowley: 4521, 4522;
Kraus: 4237, 4238;
Rieck: 4640;
Botz: 4848, 4849, 4903;
Toms: 4435;
Benington: 7252-5.

(2): That the Wrigley Company neither had the right, nor did it continue to use the enjoined dress after the accounting period, and that therefore, when it discontinued the use thereof, the continuing value, if any, of its prior advertising of the enjoined dress was destroyed, and that the continued use of the name Doublemint after the accounting period is immaterial, as the Wrigley Company at all times had the right to use that name. (Steven, 3896-8);

(3): That there is no evidence in the record justifying the assumption or conclusion that the returns on Doublemint will

finally, fully or at all recompense the Wrigley Company for the advertising cost thereof, or that the Wrigley Company's advertising had any deferred value at the end of the accounting period that could be used in determining the profits and gains made during the accounting period. (See references under Exceptions Eleventh (e) (1), (e) (2), (e) (3), (f), supra.)

440 (i) That the Master has in said report (p. 16) stated and found that by adopting the sales method Larson has been fully compensated for any value remaining in the name Doublemint at the end of the period;

Whereas, the Master should have found and concluded,

(1) That the Larson Company is not, either under the facts or under the law, entitled in this case to any compensation for the supposed value created in the name Doublemint; (See references under Exception Eleventh (e), supra) and that by adopting the sales method of apportioning advertising Larson will be more than fully or justly compensated and that an injustice will thereby be done the Wrigley Company. (See references under Exception Eleventh, (H), supra.)

(2) That the most suitable method to do justice between the parties with respect to advertising expense is the method of allocation shown in Wrigley Exh. 65, Stanley 11 (A. R. 6102), as corrected in Wrigley Exh. 92, Benington 1, pp. 4, 23, 25, or, in the alternative to so finding, the Master should have adopted either the method shown in Wrigley Exh. 65, Stanley 16 (A. R. 6106), or Wrigley Exh. 65, Stanley 2 (A. R. 6079), or Wrigley Exh. 65, Stanley 7 (A. R. 6097, 6099).

Botz—Colgate & Company, (4821-52); 4840-3; 4893-6; 4851; 4824; 4826-8; 4831-5;

Hart—Park & Tilford, (4347-73); 4351-4372;

Kraus—Stein & Co. (4178-4239); 4182-4; 4227-8; 4232-6; 4187;

LeBair—Sherman & LeBair Ad Co. (4910-39); 4918-4935;

Mace—National Biscuit Company, (4551-83); 4556-74;

Rieck—Corn Products Refining Company, (4632-50); 4638; 4639; 4641; 4642; 4645-7;

Rowley—Dixon Crucible Company, (4507-31); 4520-30; 4513-19;

Schott—Montgomery Ward & Co. (4288-4324; 4297-4305; 4308-9; 4312; 4313; 4318; 4319; 4322-4; 4334;

Toms—Liggett & Myers Tobacco Company (4414-54); 4425-31;
Wrigley Exhibit 65, Stanley 20, 6112, 6114;
Wrigley Exhibit 65, Stanley 1-20 incl.
Stanley: 595; 645-8; 654; 848;
Benington: 6958; Touche Exh. 9 (3186);
(See, also, references under Exception Eleventh (b), (c) (2), (e), (f), (h), supra.)

441 (3) That the amount properly chargeable as a selling expense of Doublemint, in arriving at the profits and gains in this case, as shown by the testimony to have been arrived at by actual measurements, amounted to $2,872,844.43 (Wrigley Exh. 65, Stanley 11; A. R. 6102; Wrigley Exh. 92, Benington 1, pp. 4, 23, 25). (See references under Exception Eleventh, (b), (e), (g), (h), supra.)

(j) That the Master has in said report stated and concluded (pp. 15-18, 20, 47) that a correct or fair analysis of the Wrigley Company's display advertising, as illustrated by its seven books of advertising marked Larson Exhibits 30-36 inclusive, will result in allowing only $996,127.45 to be deducted for advertising;

Whereas, the evidence showed and the Master should have found and stated that a correct and fair analysis was made and reported to the Master by the Wrigley Company and that the results thereof and the total amounts chargeable to Doublemint gum for the different years of the accounting period on the several classes of advertising containing so-called institutional advertising are fully, properly and correctly shown on Wrigley Exh. 65, Stanley 1-20 both inclusive, and on Wrigley Exh. 92, Benington 1, pp. 4, 23, 25. (See references under Exception Eleventh, (b), (c) (2), (e), (f), (h), (i), supra). And the Master should have taken Doublemint's portion of such items to be that shown on Wrigley Exh. 65, Stanley 1-20 both inclusive, and Wrigley Exh. 92, Benington 1, pp. 4, 6, 23, 25; Wrigley Exh. 65, Stanley 1, 2, 5, 7, 11, 16. (See references under Exception Eleventh, (b), (c) (2), (e), (f), (h), (i), supra).

(k) That the Master has refused to receive in evidence or consider the Wrigley Company's working sheets (Rec., 2414-2421; 7674; "Objection Exhibit A" No. 41; report p. 66), although they were always available to and had actually

442 been examined and used by the Larson Company's accountants (2730; 3022; 3033-4; 3370; 6460; 6230; 1129;

1130; 1137; 6449; 6074; 6271; 6452; 6296-7; 6303; 6448; 6336; 6827);

Whereas, the Master ought to have received said working sheets in evidence and considered the same, and, if he had done so, they would have proven that there is no basis or justification for the Master's percentages of institutional advertising, or for his allowance of only $996,127.45 for advertising Doublemint during the accounting period (report p. 17); but said working sheets would have confirmed the correctness of Wrigley Exh. 65, Stanley 11; Wrigley Exh. 92, Benington 1; Wrigley Exh. 65, Stanley 1-20, both inclusive, and would have shown that $2,872,844.43 should have been allowed by the Master for said advertising expenses.

(1) That the Master refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence offered by the Wrigley Company of fourteen witnesses, and of each of them, to prove, and which evidence, if received, would have proven (1), that said witnesses were disinterested and familiar with and had experience in national advertising and were competent witnesses, and (2), that it is customary and proper to charge the entire expense of advertising a given product as a selling expense at the time the same is incurred, and (3), that the allocation of such expenses on a sales basis will not truly reflect the profits derived from the advertised article, and (4), that each of said witnesses has examined Larson Exhibits 30-36, both inclusive, and is familiar with the manner in which the Wrigley Company advertised during the accounting period and allocated the expense of such advertising in arriving at Doublemint's profit shown on Wrigley Exh. 65, Stanley 11, and Wrigley Exh. 92, Benington 1, at pp. 4, 23, 25, and (5), that the method of allocation adopted in preparing said Wrigley Exh. 65, 443 Stanley 11, is the one generally used by merchants and manufacturers in ascertaining the profits of their advertised articles, and is the fairest and most equitable method of arriving at such profits, and (6), that the entire expense of said Wrigley Company's advertisements should be charged, at the time when incurred and as a selling expense, against the products mentioned in the advertisements, on the basis used in said Wrigley Exh. 65, Stanley 11, and (7), that said method should be adopted, whether in an accounting between the departments of a business, or between various advertised products, or where one is seeking accurately to ascertain the actual profits of a given article in order that they can be paid

over to an outsider who has been awarded the profits by a court decree (Rec. 4984-4986; 7620-7628).

(m) That the Master has in said report (p. 11) found and concluded that the total amount paid out for advertising during the accounting period, exclusive of donations of money, amounts to $6,798,662.73, and that this figure is not in dispute;

Whereas, the Master should have found that said sum does not include amounts which were expended by the Wrigley Company after the close of the accounting period for advertising done during the accounting period.

Stanley: 852-3; 6272; 6693-4; 6827-28;

(n) That the Master has in his report (p. 13) stated that the advertising experts who testified admit that such advertising as that placed by said Wrigley Company has an institutional value;

Whereas, the Master should have found that said witnesses testified that such advertising has no institutional value, and that the cost thereof should be charged as incurred, as a
444 selling expense, to the brands specified in the advertisements. (See references under Exception Eleventh, (b), (e), (i), supra.)

(o) That the Master has in said report (p. 14) stated and concluded that whether Larson in this case should be charged with institutional advertising is a question of law upon which the opinion of witnesses is of little, if any, value;

Whereas, the Master should have concluded that what does and what does not constitute institutional advertising, or brand advertising, is a question of fact and not of law, in this case, and that the opinion of expert witnesses upon that question is of importance and of great value.

(p) That the Master has in said report (p. 18) ascertained Doublemint's portion of such advertising items as are not named on page 17 of said report (with the exception of detailmen and war-tax rebate certificates) in the same way as its portion of brand advertising was ascertained by the Master,—that is, on the basis of Doublemint sales to total sales of advertised brands, and the Master used the amount so ascertained as a basis for his conclusion;

Whereas, the Master should not have ascertained Doublemint's portion of any such advertising items on a sales basis, or used any of the amounts so ascertained as a basis for his conclusion; (see references under Exception Eleventh, (h), supra); but the Master should have adopted, as the most suit-

able method to do justice between the parties, the method of allocation shown in and by Wrigley Exh. 65, Stanley 11 (A. R. 6102), as corrected by Wrigley Exh. 92, Benington 1, pp. 4, 23, 25, or, in the alternative, either the method shown in Wrigley Exh. 65, Stanley 2 (A. R. 6079), or in Wrigley Exh. 65, Stanley 16 (A. R. 6106), or in Wrigley Exh. 65, Stanley Exh. 7 (A. R. 6097, 6099). (See references under Exception Eleventh, (i) supra.)

445 (q) ("Advertising"—"Detail Men").

That the Master has in said report (p. 18) found and stated that the duties of detail-men are general in their nature, and he has allocated the expense thereof on the basis of Doublemint sales to all sales;

Whereas, the Master should have found that when Doublemint was introduced, their primary duties were to introduce Doublemint and nothing else, and to see that Doublemint was in the stores, and to put in the advertising matter and incidentally to check up such advertising as they might see, and he should have allowed the Wrigley Company credit for $174,028.45, the amount paid out by it for detail-men in the manner and as shown on Wrigley Exh. 65, Stanley 3, 12 (6079; 6102) and Wrigley Exh. 92, Bennington 1, pp. 4, 23, 25.

Stanley: 967-970; 6326-30; 6234-5;

Vincent: 2989; 2994 E, F.

(r) (Advertising. War Tax Rebate Certificates).

That the Master has in said report (pp. 18, 19) arrived at the amount chargeable to Doublemint on account of War Tax Rebate Certificates, by ascertaining the number of boxes of Doublemint given in exchange therefor, multiplying that number by the manufacturing cost of the gum per box and adding the cost of freight or postage; and the Master found in his report at p. 20, that Doublemint's portion of the cost of redemption of said certificates is $92,797.21;

Whereas, the Master should also have added or included Doublemint's proportion of the cost of printing the certificates themselves, (6451-3) and he should have found that Doublemint's portion of the cost of redemption of said certificates is $99,939.51 (Wrigley Exh. 92, Benington 1, p. 25). Vincent: 3047-3048.

446 (s) That the Master has in said report (p-8) stated that Juicy Fruit was put upon the market "as an advertised brand in the latter part of 1915", and, in determining the amount which the Master allowed for advertising Doublemint in the accounting period, he assumed that the Wrigley Com-

pany began to advertise Juicy Fruit heavily in the latter part of 1915;

Whereas, the testimony shows and the Master should have found that the Wrigley Company first began to advertise Juicy Fruit in the latter part of 1916 and not in 1915;

874; 875; Touche Niven & Co.'s report (Larson Exh. 132) pp. 6, 8, 9;
Steven: 3839-3842;
Vincent: 3238-41;

and, if the Master had found, as he should have done, that the Wrigley Company did not begin to advertise Juicy Fruit until the latter part of 1916, he would not have found and concluded that only $996,127.45 should be allowed the Wrigley Company for advertising it Doublemint gum during the accounting period.

(t) That the Master has found and stated in said report (pp. 15-17) that certain percentages of certain classes of advertising were institutional;

Whereas, there is no evidence to support any of said percentages and they were arbitrarily adopted by the Master.

(See references under Exception Eleventh (b), (e), (i), supra.)
Larson Exhibits 30-36, (both incl.): 1135-7; 882; 920-2;
Larson Exhibit 8; Wrigley Exh. 65, Stanley 4, 5, 6, 10, 13, 15, 20, A. R. 848.

The Master also stated and found that the balance of said classes of advertising (after deducting the amount of institutional advertising so arbitrarily ascertained as aforesaid) was brand advertising, and the Master then apportioned the amount of brand advertising so ascertained, on a basis of
447 Doublemint's sales to sales of all advertised brands, and he found (p. 20) that the amount of brand advertising, so ascertained, which should be allowed for Doublemint during the accounting period, was $517,280.59.

And the Master also found and stated in said report (p. 20) that "Doublemint's portion (based on ratio of Doublemint sales to total sales of advertised brands) of institutional advertising as amortized", amounted to $205,079.78 and he allowed that sum for said item.

And the Master has in said report (p. 20) also found and stated "Doublemint's portion (based on ratio of Doublemint sales to total sales of advertised brands) of advertising containing no institutional features", to be $107,988.63;

Whereas, there is no evidence to support any of said calculations or conclusions, and the Master should not have determined the amount of institutional advertising in the manner employed by him and he should not have amortized any advertising, either over a period of four years, or at all, and he should not have used the sales basis in determining any of said items, but the evidence showed and the Master should have found and concluded that all of said advertising was brand advertising excepting not more than $21,171.67 (Wrigley Exh. 65, Stanley 5; A. R. 6090-5; 6274, 6275) and that by actual and accurate measurements Doublemint's portion of all said advertising amounted to $2,872,844.43 (Wrigley Exh. 65, Stanley 11, A. R. 6102; Wrigley Exh. 92, Benington 1, pp. 4, 23, 25). (See references under Exception Eleventh, (b), (e), (h), (i), supra).

(u) That the Master has in said report (pp. 16, 17) stated that he has prepared a table which "shows the percentages of institutional arrived at for the different years on the several classes of advertising containing institutional, the total amount expended for each class and the part that has been eliminated as institutional" and that he has prepared and based his conclusion on the "Summary of Advertising" at p. 20 of the report;

448

Whereas, there is no evidence to support any of the percentages shown in the report at p. 17, or any of the figures shown in the report on p. 20; (see references in second paragraph of (t) in Exception Eleventh, supra); and the Master failed and refused to comply with the Wrigley Company's request ("Objection Exhibit A" Item 40) to state in his report from what testimony or exhibits and how he arrived at his conclusions concerning advertising, and at the percentages referred to and used by him at p. 17 of his report, and at the figures shown in the column headed "Total" next to the last column on page 17 of the report, and at the sums which he apportioned in determining the figures shown in said "Summary of Advertising" on page 20 of his report, and what were the amounts of each class of advertising which were thus apportioned.

Twelfth: (Advertising Subscriptions).

That the Master has in said report (p. 19) found and stated that the Wrigley Company received advertising on programs and local trade papers, etc., for only a small portion of the items aggregating $191,267.62 expended for patriotic, benevolent, religious and business organizations, and that the value

received from an advertising point of view is small and cannot be ascertained, and that it is doubtful if those disbursements had any other effect than to help to build up a good-will for the Wrigley Company, and that though they may, to some degree, have benefited sales, yet, if so, the benefits derived were not great and are incapable of ascertainment, and
449 the Master refused to allow any deduction to be made on account of any of said expenditures;

Whereas, the evidence shows and the Master should have found that said sum of $191,267.62, and every part thereof, was paid out by the Wrigley Company during the accounting period to various associations and organizations, as reasonable, usual and proper expenses of its business, and that each of said disbursements was necessary and proper in the ordinary and usual conduct of its business and in order to advertise and also to protect the same, and to advance the interests of the Wrigley Company and to procure and maintain the good will of its patrons and of the public;

Stanley: 6696-6723; 6757-9; 6763; 6766-7; 6804-6810; 6693-6810; xxxx 1013-1015;

Wrigley Exh. 71, Stanley 1.

and the Master should have found and concluded that $28,740.38 of said sum of $191,267.62 was probably chargeable against Doublemint. (Wrigley Exh. 92, Benington 1, Exhibit "A 1", page 23-a).

Thirteenth: ("Good Will"—Report p. 48).

(a) That the Master has in said Report (p. 48) found and concluded that the Larson Company is entitled to be compensated for the good will created by the Wrigley Company during the accounting period and for the supposed value created in the name "Doublemint," and he has compensated the Larson Company therefor, and he has adopted as a measure of such compensation, the elimination of so-called institutional advertising, the amortization thereof and the allocation of the balance of the advertising expenses on a sales basis;

Whereas, the Master should have found and concluded that the order of reference does not justify or permit his making any allowance to the Larson Company for the value of any good will created by the Wrigley Company during the ac-
450 counting period, or for any part of such value, or for any value created in the name "Doublemint", and that the burden of proving such good will and value is on the Larson Company, and that it has not sustained such burden, and that there is no satisfactory, reliable or sufficient proof in the

record concerning such value, if any, and that the evidence with respect to the existence of such value, if any, is wholly indefinite, uncertain and speculative, and the Master should not have allowed the Larson Company anything on account of said good will. (See references under Exception Eleventh, (e), (f), (b), (i), (c) (2), supra.)

(b) That the Master refused, (on objection of the Larson Company and over the exceptions of the Wrigley Company) to allow William H. Stanley to give testimony on behalf of the Wrigley Company, which, if he had been permitted to testify, would have proven that for several years next prior to July 28, 1914, the Wrigley Company advertised its Spearmint gum throughout the United States and its possessions and throughout Canada, Great Britain and Ireland, Australia, New Zealand, the West Indies and part of South America (Rec. 6240), and the extent of its foreign sales from January 1, 1911, to July 28, 1914, by years and by countries, (7036, 7037; "Wrigley Exh. 95, offered, not admitted"); and the Master likewise refused to allow Edward W. Eckerly to give testimony on behalf of the Wrigley Company, which, if received, would have proven that the Wrigley Company, since January, 1911 manufactured and extensively sold various brands of chewing gum in every town, village and city in every state in the United States and in numerous foreign countries and at all times used, in connection therewith, (except on private brands) the name "Wrigley's", or "Wm. Wrigley Jr. Co.", or both, conspicuously on counterband wrappers containing five sticks of gum and on all boxes containing the gum and also in connection with its advertising of all gum (A. R. 7098-7099);

Whereas, said rejected evidence was competent and admissible to show (1) that there was no likelihood of confusion between Wrigley's Doublemint Gum and Larson's Wintermint gum inasmuch as the Larson Company and its gum were unknown in most of said territory, and also to show
451 (2) the existence of a good will at the time Doublemint gum was first marketed, at least equal to that earned by the Wrigley Company's advertising during the accounting period.

(c) That the Master, (on objection of the Larson Company, and over the Wrigley Company's exceptions) refused (6241-2) to allow William H. Stanley to give testimony for the Wrigley Company, which if received, would have proven the extent of the heavy competition which the Wrigley Company

had during and at the end of the accounting period, and would have shown the absolute necessity of the Wrigley Company's continuing its extensive advertising and other energies after the accounting and that there was no hold-over or deferred values, at the end of the accounting period in the Wrigleys Company's advertising during that period, and that the Master ought not to have amortized any of the advertising expenses, or allowed anything to the Larson Company on account of any good will created thereby.

Fourteenth: (Overhead Expenses, Report, pp. 21-34).

(a) ("Depreciation on buildings", etc.)

That the Master has in said report (pp. 21, 22) stated and found that as Larson accepted the manufacturing cost as stated in the filed account, the item, "Depreciation on Buildings," "Tax on Essential Oil," and "Salaries and Expenses of Brooklyn and Toronto," are conclusively presumed to be included therein, and should not be allowed as overhead;

Whereas, the evidence showed and the Master should have found and stated that the Wrigley Company is entitled to deduct said three items, and each thereof, as claimed by it.

(Wrigley Exh. 92, Benington 1, pp. 55, 56, 57) Mr. Aldrich's statement Dec. 10, 1918, A. R. 228 Buck: 363, 447, 426-B, 446 (which was over two months before Mr. Aldrich announced his acceptance of manufacturing costs). Benington; 6901-2.

(b) (Frank F. Pulver.)

That the Master has in said report (pp. 23, 24) found 452 and concluded that no part of the payments made to Frank F. Pulver during the accounting period should be treated as an expense:

Whereas, the evidence showed and the Master should have found that, at the time of the settlement of the infringement suit referred to by the Master, the said Pulver was engaged in a competing and growing gum business, and that, by the terms of said settlement agreement, said Pulver sold to the Wrigley Company his valuable business and good will thereof, and also valuable machinery, supplies trade-marks and trade-names, and that it was also of value to the Wrigley Company to procure said Pulver's agreement not to engage in the chewing gum business in the United States or Canada for a period of 25 years; and the Master should have allowed $33,107,48 as a deduction from the Doublemint profits, arrived at by writing off $241,097. (The difference between the total amount of $250,000 paid Pulver and the amount realized from

the sale by Wrigley of Pulver's tangible assets, $8903), in equal installments commencing December 19, 1913 and ending December 31, 1918.

Wrigley Exh. 92, Benington 1, pp. 61-3 (Benington, 7193-7196;
Marwick, Mitchell Peet & Co. Report, pp. 76-7;
Whitworth, 3463; Paine, 2483-5, 2583.)
Vol. I stenographic copy of proceedings before Judge Anderson, pp. 244, 248, 257, Exhs. 10, 11, 12);
Vol. II id. p. 570;
Printed transcr. of Rec. on 1st App. pp. 54, 116-112, 125, 126, 141, 147;

(c) ("cost of Alterations of Main Office").

That the Master has in said report (p. 24) found and concluded that the Larson Company's contention that the item of "Cost of Alterations of Main Office" should be charged off over the life of Wrigley's lease, is fair and just between the parties, and he allowed only $114.19 for that item;

Whereas, the evidence showed and the Master should have found that Larson's said contention is unfair and unjust,
453 and the Master should have allowed the Wrigley Company credit for $418.10 for said item.

Wrigley Exh. 92, Benington 1 p. 64;
Paine, A. R. 2606-8; 2515; 2516; 2600; 2610-12.

(d) ("Plans for Factory Additions")

That the Master has in said report (pp. 24, 25) found and concluded that it is improbable that Doublemint would have received any material benefit during the accounting period, from the item of expense, "Plans for Factory Additions," as it is unlikely that such a building would have been completed before the close of the accounting period and that it is not a proper expense but should have been charged to the cost of building;

Whereas, the evidence showed and the Master should have found that said item constituted a proper item of expense, and he should have allowed the charge made therefor by the Wrigley Company.

Wrigley Exh. 92 Benington 1, p. 65
Paine, 2534; Stanley, 6924; 6925,

(e) ("Advances to Chicle Growers")

That the Master has in said report (pp. 26, 27) found and stated that the "Advances to Chicle Growers" were not established by the Wrigley Company as losses accruing within

the accounting period, and he disallowed the Wrigley Company's claim for said advances;

Whereas, the evidence showed and the Master should have found that said losses were proven by the Wrigley Company to have been sustained during the accounting period, and the amount thereof should have been allowed by the Master as a proper deduction from the Doublemint profits.

Wrigley Exh. 92 Benington 1, p. 78
Benington, 7211-7216;
Paine, 2493-5; 2513; 2596-9

(f) ("Reapportionment of 1918 Overhead")

That the Master has in said report (p. 28) refused to allow the Wrigley Company to deduct from the profits on Doublemint, $12,500.25 as a result of a "Reapportionment of 454 1918 Overhead", as was sought to be done in Wrigley Exhibit 92, Benington 1, pp. 85-87;

Whereas, the evidence showed and the Master should have found that said amount of $12,500.25 was a proper item to be deducted from Doublemint profits. (id.)

(g) ("Brooklyn Moving Expenses").

That the Master has in said report (pp. 30, 31) found and stated that the claim filed by the Wrigley Company against the United States Government in connection with the item "Brooklyn Moving Expenses" covers a part only of the claim presented here, and that no good reason is given why it should not cover the entire claim, and the Master refused to allow the Wrigley Company to deduct $28,392.93 from Doublemint profits on account of said item;

Whereas, the evidence showed and the Master should have found that the nature and details of the claim filed against the Government are immaterial in this case, and that a good reason has been shown why the claim against the Government did not cover the entire claim filed here, and he should have allowed the Wrigley Company to deduct said sum of $28,392.93.

Wrigley Exh. 92, Benington 1, pp. 94-100 inc;
Stanley: 6998-7015; 7035; 7037-7038;
Larson Exh. 173; (7038);
Benington: 7163-7168; 7184-7187;
Paine: 2485-7; 2519;
Whitworth: 3149.

(h) ("Summary of Overhead Expenses")

That the Master has in said report (p. 33) prepared a "Summary of Overhead Expenses" and has allowed the

Wrigley Company to deduct only $915,506.09 on account of "overhead expenses";

Whereas, the evidence shows and the Master ought to have found that the Wrigley Company is entitled to deduct $969,669.35 as Overhead Expenses, as shown in Wrigley Exh. 92, Benington 1, pp. 4, 17, 52, 53, 54. (See references supra, under Exception Fourteenth).

455 Fifteenth: (United Profit Sharing Coupons, Report pp. 35-37).

(a) That the Master has in said Report (pp. 35-37) found and stated that owing to the difference in the commodities with which the coupons were given and in the manner and conditions under which they were issued and redeemed, the experience of one concern issuing coupons is a little value in determining what the experience of another concern would be, and that because of the confusion resulting from the manner in which the coupon business was carried on by Wrigley and the inherent uncertainty and confusion in the coupon system itself, it is impossible to fix with reasonable accuracy a percentage of issues to cover redemptions, and that any opinion in that respect is necessarily based on conjecture (p. 37); and that not more than 33⅓ per cent of the coupons issued by the Wrigley Company during the accounting period will finally be presented for redemption, and the Master used that percentage and allowed only $2,305,318.75 to provide for redemptions (p. 37) and he allowed only $98,519.06 as the amount of the contingent liability on account of the issuance of said United Profit Sharing coupons (p. 37) to be deducted from the amount of Doublemint's profits;

Whereas, the evidence showed and the Master should have found that the Wrigley Company proved, by competent witnesses, the experience of others issuing coupons of more or less analogous character under similar conditions and over a long period of years, and the Master should have found that such testimony was material and of great value, and that the United States Government has, for taxation purposes, permitted the Wrigley Company to set up a reserve, based on the Wrigley Company having to ultimately redeem 60 per cent of all its issued coupons, and the Master should further have found and concluded that the evidence shows, with reasonable and sufficient certainty, that at least fifty per cent $(3,457,

456 978.14) of all the coupons issued by the Wrigley Company during the accounting period will ultimately have to be redeemed by the Wrigley Company, and that at the end of the

accounting period there existed a contingent liability against the Wrigley Company, because of the coupons issued by it during the accounting period and not redeemed during the accounting period, amounting to at least $1,623,460.04 (Wrigley Exh. 92, Benington 1, p. 31, lines 3, 9) and that, of said amount, at least $314,252.03 (id. line 13) should be charged to Doublemint in this accounting, and the Master should have dedeucted an account of said contingent liability, at least said sum of $314,252.03, instead of only $98,519.06.

Wrigley Exh. 92, Benington 1, pp. 4, 10, 11, 28, 30, 31, 32.

Larson Exh. 193; (7573; 7601).

Wrigley Exh. 102; (7386-8; 7672); Wrigley Exh. 102A; (7566);

Larson Exh. 56; (1183-1202).

Wrigley Exh. 63, Atwood 2, 3; (5383; 5389).

Larson Exh. 194, (7603). Larson Exh. 26-29, incl. 727-737;

Marwick, Mitchell, Peet & Co. report, pp. 114-144;

Stanley: 689-94; 698-719; 1004-8; 1011; 1012; 7528-7531; 7383-7398; 6251-4; 7604-08; 6942; 6943; 7542-8. 722-36; 6247; 7537, 8; 7564-7; 7672.

Becton: (United Cigar Stores Co. United Profit Sharing Corp. 5222-5319); 5222-5237; 5250-5259; 5281-5317; 5341-5344; 5356-61. Wrigley Exhibits 55-60, incl. (5247; 5259; 5294-5; 5299; 5301.)

Reinach: (Schulte Retail Stores. 5007-5032); 5007-5010; 5021-5031.

Toms: (Liggett & Myers Tobacco Co. 4414-54); 4414-17; 4421; 4438-4449; 4453; 4454; 4481-89.

Atwood: (Proctor & Gamble Co. 5362-5418); 6316-6321; 5362-5391; 5413-17; 5459; 5467; 5468; 5474-79; 5464; 5482-5490; 6316-21; 5434-5439; 5428-34.

Brenner: (Kirkman & Son 4681-4713); 4681-4700; 4706-4713; 4719-4725; 4731-4739.

Richards: (Kirkman & Son 5057-93); 5093; 5057-5076.

Goetzinger: (Arbuckle Bros. 4985-4998); 4986-98; 5003-5005;

Parsons: (Borden Sales Co. 5094-5122); 5131.

Mortimore: (Surety Coupon Co.) 5142-5167.

Brine: (Merchants Legal Stamp Co.) 4740-4764; 4770-4785; 4800; 4817-4818;

Steven: 3857; 4005.

Freeman: 3766; 3769; 3770.
Whitworth: 3102-3104; 3430-32; 3458; 3469-78; 3479;
Vincent: 2641; 3346; 3268-76; 3292-6; 3300-6; 3347-49; Wrigley Exh.
Wrigley Exh. 63, Atwood 7 (6320); 3209-12; 4269-4278; 12, Sheet A.
Eckerly: 737-742;
Offers to prove: 6249-51; 5209-5214;
Kirkman: 7628-7631.

457 (b) That the Master, in the trial of the cause, refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence of William H. Stanley offered by the Wrigley Company to prove (6247-6251; Wrigley Exh. 65, Stanley 32) and which testimony, if received, would have proven that over half of the Wrigley Company's coupons were distributed during the accounting period in territory where there were only a third of the redemption stations, and that it did only about 45 per cent of its business in territory where there were about two-thirds of the redemption stations, and that only about forty million people lived in the places where the redemption stations were, and that over sixty-five million people (using 1920 census as basis) lived in territory where there were no redemption stations at all; that during accounting period 19.4 per cent of the Wrigley Company's coupons were distributed in four states where there were 102 redemption stations; that 45.8 per cent of its coupons were distributed in eight states where there were a maximum of 163 premium stations, and that the remaining 54.2 per cent of its coupons were distributed in the remainder of the United States in which there were only 81 redemption stations; that 7.5 per cent of the coupons, distributed during the accounting period were distributed in ten states where there were no redemption stations, and that in eighteen states, in which there were only 11 redemption stations, 15.7 per cent of the coupons were distributed, and that in eight states where there were only eleven redemption stations 8.2 per cent of the coupons were distributed.

(c) That the Master, in the trial of the cause, refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence of additional competent witnesses offered by the Wrigley Company to prove, and which evidence, if received, would have proven their experience in issuing and redeeming, over a long period of

years, coupons similar to Wrigley Company's coupons
458 and under circumstances and conditions similar to those under which the Wrigley Company's coupons were issued, and that the Master erred in allowing only 33⅓ per cent instead of at least 50 per cent of the value of all coupons issued by the Wrigley Company during the accounting period as its contingent liability on account of its issuance of coupons during said period. (A. R. 5209-5214; 7628-7631.)

Sixteenth: (Depreciation of Patents and Patent Rights. Rep. pp. 38-40.)

(a) That the Master has in said report (p. 38) stated and found, while referring to the value of patents and patent rights owned by the Wrigley Company, that "it is not established by appraisal, by money price paid therefor, or by other competent evidence", and (pp. 39-40) that the evidence regarding the value of the common stock, and all the evidence respecting the value of the patents and patent rights, is too speculative and conjectural, and that the evidence showing the valuation of patents and patent rights accepted by the Government for taxation purposes and the evidence regarding the superiority in use if and the savings from the use of the machines made under these patents and patent rights, over machinery open to the Larson Company and other manufacturers, and the rest of the testimony in the record pertinent thereto, was of sufficient significance, or certainty, to permit the Master to arrive at a fair and reasonable approximation of the value of these patents and patent rights for the purpose of making deductions therefor from the so-called gross profits;

Whereas, the Master should have found that the evidence, including the valuation placed on the patents and patent rights of the Wrigley Company by Nelson L. Buck and by the Government—($1,500,000); the amount of stock paid for these patents and patent rights by the Wrigley Company; the value of this stock which was used by the Wrigley Company in payment for the purchase of these patents and patent rights; and the evidence of the savings resulting from their use in the manufacture of Doublemint gum—, was not speculative and conjectural, but was certain and definite
459 and showed that the patents and patent rights were fairly and reasonably worth at least $1,500,000., and the Master should have deducted from the gross profits of Doublemint, in arriving at the net profits and gains in this account-

ing, the sum of $64,267.43 as depreciation of patents and patent rights during the accounting period.

Nelson L. Buck: (5525-5715) 5525-5537; 5608; 5618; 5649; 5656; 5618-3 5689-99; 5665-5676; 5547-51; 5700-1; 6558, 9; 6567-70; 6620-39; 6624; 5532-5670; 5720-5784; 6555-6646; 5676-5715; 5525-6069; 6637; Wrigley Exh. 64, Buck 1-65 (both inclusive);
Stanley: 6810-14; 833, 834; 905; 906; 192; 3493; 3671; 7613;
Benington: 7179-84;
Sessions: 6672-6690;
Larson Exh. 145a (3745); Larson Exh. 153 (3829-3833); Larson Exh. 152 (3821);
Larson Exh. 157-166 (both incl.) 6000-6; 6019, 6024; 6029, 6030; 6056;
Wrigley Exh. 92, Benington 1, p. 16;
Vincent: 2848; 2851; 2929; 3264-5;
Becker: 6495-6555;
Mr. Aldrich: 2458-2465.

(b) That the Master (on objection of the Larson Company and over the Wrigley Company's exceptions) struck out and excluded (7653-7) the evidence of Nelson L. Buck and of other witnesses, showing the superiority and savings made in the use of the machines made under the patents and patent rights acquired by the Wrigley Company at the time of its incorporation, over machinery open to Larson and other manufacturers, and also showing the fair, reasonable value of said patents and patent rights at the time the Wrigley Company was incorporated and acquired the same, to have been at least $1,500,000; and that the Master, likewise also refused (7020-7028) to permit the Wrigley Company to substantiate said excluded evidence by the witness, L. P. Larson Jr., president, manager and principal owner of the Larson Company. (See references to testimony in Exception Sixteenth (a), p. 44, supra.)

(c) That the Master refused (on objection of the Larson Company and over the exceptions of the Wrigley Company) to permit the Wrigley Company to prove the amount of 460 dividends paid by the Wrigley Company on its common stock in 1911 (the year of its incorporation), 1912, 1913 and 1914, and the value of its common stock in 1914, 1915 and 1916, which proof, if received, would have shown the Company's patents and patent rights to have been fairly and reasonably worth at least $1,500,000 at the time they were ac-

quired by the Wrigley Company. (6255-6; 6801-4; and see references under exception Sixteenth (a), p. 44 supra).

Seventeenth. ("Miscellaneous Income." Report p. 41).

That the Master has in sand report (p. 41) found and stated that profits were realized and retained by the Wrigley Company on the Doublemint business during each of the accounting periods, and that Doublemint should have credit for its share of any income from the investment of such funds, whether considered as invested in the gum business or otherwise; and the Master considered and treated the assumed accumulated Doublemint profits as Doublemint's investment in the business, and allocated the total of so-called "Miscellaneous Income", amounting to $349,804.89, in the proportion that the accumulated profits of Doublemint at the first of each calendar year bear to the total invested capital excluding intangibles, and the Master added to the Doublemint profits the sum of $71,905.74 as "miscellaneous income", in his "Summary of Profits," at p. 47 of said report;

Whereas, the Master ought not to have included in this accounting any portion of the item of "Miscellaneous Income" as a gain or profit on Doublemint gum, unless interest on the Wrigley Company's invested capital be deducted from Doublemint profits; and if such deduction be made for interest on invested capital, then the Master should have found that only $26,202.73, instead of $71,905.74, should be added to Doublemint profits, said sum of $26,202.73 being the proper proportion of such part of said "Miscellaneous Income" as was derived from investments forming a part
461 of the Wrigley Company's invested capital on which interest is allowed. (Wrigley Exh. 92, Benington 1, pp. 103, 104);

And because there was no evidence to support the Master's finding that $71,905.74 should be added to Doublemint's profits as "Miscellaneous Income," the Master ought to have stated in his report, as he was requested to do by the Wrigley Company, in its Objection No. 63 in "Objection Exhibit A" (1) What amounts he used for Invested Capital at the first of each calendar year during the accounting period, in making his allocation on pp. 41 and 47 of said report of "Miscellaneous Income," and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the Master to enable him to arrive at the amounts of Invested Capital used by him in this connection; and (2) what amounts he used for "Miscellaneous

Income" for each of the accounting periods in making his allocation thereof on pp. 41, 47 of said report, and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the Master to enable him to arrive at the amounts of "Miscellaneous Income" used by him in this connection.

Eighteenth. (Federal Taxes. Report pp. 42-45).

(a) That the Master has in said report found and concluded (pp. 42-45) that the Wrigley Company is not entitled to make any deduction on account of the Federal Income and Excess Profits taxes which it paid the United States Government for the year 1917 and 1918;

Whereas, the evidence shows that the Wrigley Company is entitled and the Master should have allowed it to deduct $621,108.97 in this accounting for the Federal Income and Excess Profits taxes which it paid on acount of its Doublemint profits for the year 1917 and 1918; and that if the law be otherwise, and if the Doublemint profits had been the
462 only profits earned by the Wrigley Company in 1917 and 1918 and are so treated, then the Wrigley Company should be allowed $427,737.51 on account of said taxes; and that if the law be otherwise, then the Master should have allowed the Wrigley Company, because of the payment by it of said taxes, at least the sum of $372,942.09, that being the same proportion of the total Federal Income and Excess Profits taxes paid by the Wrigley Company in 1917 and 1918, as the profits from Doublemint gum during those two years bore to the total profits of the company in those two years.

Wrigley Exh. 92 Benington 1, pp. 18-23; 106, 107;
Touche Exh. 9 (3186; 3188)
Benington; 7614-7619; 7310-7314; 7323-7325; 7301-7; 7187-92;
Account filed by the Wrigley Company Dec. 3, 1918. pp. 4, 5, foot notes;
Vincent: 3051; 3048; 3054; 3057; 3065-6; 3308-3312;
Whitworth: 3443-3444; 3460-1 3482-3483;
Stanley: 7687; 7688; 7676; 7677.

And the Master should further have found and concluded that the court has the power, if necessary, to protect the interests, if any, of the Larson Company with respect to the tentative credit of $422,223.64 which the Wrigley Company deducted from its 1919 income.

(b) That the Master refused (on the Larson Company's objections and over the Wrigley Company's exceptions) to

comply with the Wrigley Company's request that the Larson Company be required by the Master to produce before the Master a copy of its Federal tax returns for the year 1914, 1915, 1916, 1917 and 1918, and for each thereof, and that the Master appoint a competent auditor, at the Wrigley Company's expense, to examine the books and records of the Larson Company so as to furnish the Master all information necessary to enable him and the courts to determine how much Federal Income and Excess Profits Tax the Larson Company would have had to pay on the profits it claims to be entitled to receive from the Wrigley Company in this accounting, if such profits had been paid to the Larson Company as and when earned by the Wrigley Company. (A. R. 7033-4; 7046-7053).

463 (c) That the Master refused, on objection of the Larson Company and over the Wrigley Company's exceptions) to receive evidence which the Wrigley Company offered to introduce by the witness L. P. Larson, Jr., which evidence, if received, would have proven (1), precisely what Federal Income and Excess Profits taxes the Larson Company had to pay for its 1917 and 1918 business, and also, (2)what amount it would have had to pay as an additional tax upon any further profits which it might have received in those years, and, also, (3), that said Larson Company would have had to pay at least 60% on such amounts of profits as it claims were earned by the Wrigley Company from the manufacture and sale of its Doublemint gum at any time during the accounting period, and that said Larson Company would have had to pay at least as high a percentage as the Wrigley Company had to pay and at least as large an amount as the Wrigley Company deducted in its filed account for Federal Income and Excess Profits Taxes (7131-7133; 7028-7033; 7046-7053).

(d) That the Master found and concluded in said report (p.42) that it was improper for the Wrigley Company to deduct for its Federal income and excess profits taxes for the years 1917 and 1918 an amount arrived at on the theory that Doublemint profits were the last to be made and should therefore bear the highest rate of tax, and that it was later on so conceded;

Whereas, the evidence shows and the Master should have found that the Wrigley Company has at all times insisted that said taxes should be allowed to it at the highest rate. (See filed account, pp. 4, 5. Offers to Prove: 7132-3).

(e) That the Master found and concluded at p. 43 of his report that it does not appear that when the Wrigley Company paid its taxes for 1917 or 1918, or since the decree was entered, the Wrigley Company at any time informed the
464 Government of either the pendency of this suit, or of the terms of said decree, or took any other protecting steps in its behalf;

Whereas, the Master should have found that whether or not the Wrigley Company gave any such information to the Government is immaterial in this case.

(f) That the Master found and concluded at p. 43 of his report that if the Larson Company is charged in this accounting with taxes paid by Wrigley, it will be subjected to double taxation;

Whereas, the Master should have found and concluded that said question is immaterial.

(g) That the Master found and stated in his Report (p. 44) that the evidence indicates that the profits of the Wrigley Company for two years will be ample to cover the amount of the profits awarded to Larson by the Master;

Whereas, there was no evidence to justify said finding and the Master should have so found.

(h) That the Master found and concluded in his Report (p. 44) that the facts in this case do not require a court of equity, in its discretion, to relieve against hardships from changes in the Federal tax laws, and (Report p. 45) that if the Wrigley Company is entitled to relief in that connection, it must obtain it from the Government and that, if necessary, courts of equity are open for that purpose;

Whereas, the Master should have found that neither the evidence nor the equities of this case require the Wrigley Company to seek relief from the Government on account of the payment of its Federal Income and Excess Profits taxes for 1917 and 1918, but require, and the Master should
465 have found that the amount so paid by the Wrigley Company be allowed it as a credit in this case. (See references under Exception Eighteenth (a), (b), (c), pp. 47, 48 supra).

Nineteenth. (Interest on Invested Capital, Report p. 46).

(a) That the Master has found and concluded in his Report (p. 46) that the items making up the investment in tangible assets would have to be recast before an amount could be arrived at, on which, in a proper case, interest on invested capital might be computed;

Whereas, the evidence shows and the Master should have found that the items making up the investment in tangible assets on which interest is allowable have been sufficiently and properly proven by the Wrigley Company.

Larson Exhibits 10, 11, 12, 13 (192-198); Wrigley Exh. 93 (6933);
Wrigley Exh. 92, Benington 1, pp. 4, 12, 13, 38-43 inclusive;
Freeman: 3754-3760; 3727-3730; 3788-9;
Bennington: 7154-6; 6908-10;
Vincent: 2921;
Larson Exh. 140 (3523); Larson Exh. 152 (3821);
Mr. Aldrich's Statement: 2458-2462;

And, if any recasting had been necessary, then the Master ought to have stated and certified in his report the items making up the investment in tangible assets, especially as the Wrigley Company in its Objection No. 74 in "Objection Exhibit A" offered to place, at its own expense, at the Master's disposal, as it had done during the entire accounting period and while the Master was preparing his Draft Report, a competent accountant to be selected by the Master to do any work required in order to comply with the requests of the Wrigley Company contained in said "Objection Exhibit A."

(b) That the Master has in said report (p.46) concluded and stated that interest on invested capital does not enter into manufacturing or selling costs, and he refused to allow the Wrigley Company to make any deduction for such
466 interest;

Whereas, the Master ought to have concluded that it is not fair or just to the Wrigley Company for him to disallow interest on invested capital in his report, and at the same time treat (p. 46) as a part of Doublemint's profits a portion of the amount received as income from invested capital; and the Master should have allowed interest, as claimed by the Wrigley Company, on Doublemint's proportion of the tangible capital used by the Wrigley Company in its business during the accounting period.

Whitworth: 3128-3130; 3114-6;
Wrigley Exh. 92, Benington 1, pp. 4, 12, 13, 38-43;
Stanley: 6929-6940; 6949-51;
Benington: 7154-7156; 7169-7178; 7206-7;
Wm. Wrigley Jr.: 220-222;

Vincent: 2847-8; 2954-6; 2964; 2921-5; 2929; 2931-4; 2936-9; 2876-7; 3048; 3054-57; 3064-6; 3121; 3264-5;

Buck: 5596-5600; 5525-5530; 5668-76;

(See references under Exception Nineteenth (a), p. 50 supra.)

As to the rate of interest, see;

M. M. Emerich: 6647-6663;

Hitchcock: 6664-6672;

Freeman: 3633-4;

Steven: 3996; 4013;

(c) That the Master has in said report refused to allow the Wrigley Company to make any deduction on account of interest on its investment in patents and patent rights;

Whereas, the evidence shows and the Master ought to have found that the Wrigley Company is entitled to deduct Doublemint's proportion of such interest, as it calculated the same on a capital value of $1,500,000 for patents and patent rights through the accounting period.

Whitworth: 3440; Wrigley Exh. 92, Benington 1, p. 13, 44;

See references under Exception Sixteenth, Nineteenth (a), (b), pp 50, 51 supra;

(d) That the Master has in said Report failed and refused to allow the Wrigley Company throughout the accounting period, Doublemint's proportion of interest, as claimed by the Wrigley Company, on $6,000,000 as the amount
467 paid by the Wrigley Company for good will when it was incorporated.

Bennington: 6995; 6996

Whitworth: 3417; 3418; 3463;

Wrigley Exh. 92, Bennington 1, pp. 14, 49;

Wrigley Exh. 92, Bennington 19, p. 3;

(See references in Exception Sixteenth, p. 44, supra.

Twentieth: That the Master did not find that the Larson Company never used any coupons or counterband coupon wrappers (7034; 7035), and did not conclude that the Wrigley Company should not be required to account for the gains and profits to it accruing or arising from the manufacture and sale of at least so much of its Doublemint gum sold during the accounting period as was wrapped in coupon counterbands or wrappers which were redeemed by the Wrigley Company.

Twenty-First: (Manufacturer's Profits.)

That the Master has, in said report, failed and refused to allow the Wrigley Company credit for a manufacturer's profit, and excluded (on the Larson Company's objection and over the Wrigley Company's exceptions) evidence of the value and amount thereof.

Wrigley Exh. 92, Benington 2; pp. 7332-7334; 6903-7; p. 38 of Wrigley Company's account filed with the Master March 6, 1919;

Twenty-Second: (The L. P. Larson Jr. Company's Unclean Hands).

That the Master has failed to find and conclude that the Larson Company did not come into court with clean hands, and that it was therefore not entitled to recover any profits.

Whereas, the evidence shows and the Master should have found and concluded that the Larson Company was guilty of such fraud and deception as to disentitle it to an award of profits in this case, because, as the evidence shows and the master should have found.

468 (a) The Larson Company falsely asserted, in its application for registration in the patent office, of its trademark "Wintermint." (Vol. II. original stenographic minutes of trial of main case before Judge Anderson, pp. 427-450, especially pp. 442, 443, 449, 450; and also in its answer and counterclaim filed in this case, Printed Transcript in first appeal of this case, p. 56); and in its affidavit filed in its original mandamus proceeding in 7 C. C. A. in this case, No. 2822, Printed Transcript, p. 2; and in its testimony before the Master, A. R. bottom 1805-1806), that it began to use gum under the "Wintermint" label as early as December 1913;

Whereas, the evidence shows and the Master should have found that such statement was knowingly false, and that the Larson Company sought to conceal its falsity by pretending to have made a sale to a relative of L. P. Larson Jr. (the principal owner, manager and in control of the Larson Company) in December 1913, and by fraudulently altering its books of accounts and records to so show.

A. R. 1772, 1773, 1777-1779; 1803; 1848; 1849; 1852; 1853; 2097; 2099-2101; 2105; 2113; 2356; 2378; 2345; 2350-82;

(b) The Larson Company sought to, and did, in fact, wilfully deceive the court in this case into erroneously believing that it had a growing and extensive business throughout the

United States when the Wrigley Company first introduced its Doublemint gum;

Whereas, the evidence shows and the Master should have found that the Larson Company never had but a trifling and nominal business in Wintermint gum, and that its Wintermint gum sales had practically ceased before sales of Doublemint gum were well started.

469 (Larson Company's verified counterclaim at pp. 57, 59 of printed transcript in first appeal;

Mr. Aldrich's opening statement before Judge Anderson on the trial of main case. (Vol. I, stenographic copy of proceedings before Judge Anderson, p. 12.)

Testimony of Larson, Vol. II, stenographic proceedings before Judge Anderson, pp. 577, 578, 580 and bot. p. 167, 168 of printed transcript in first appeal.

Larson Company's main brief filed Aug. 2, 1917 in 7 C. C. A. in first appeal in this case, pp. 12, 13, and Larson Company's "Reply Brief" filed in first appeal herein Oct. 25, 1917, p. 3;

Affidavit of Larson filed in 7 C. C. A., April 23, 1920, Printed Trans. in Mandamus proceeding, (pp. 47, 52, 53, 62);

Bottom A. R. 1805-1814; bot. 427; 428; 7083-7091;

Larson: 7136-9; 7338; 7342; 2139; 2150; 2097-2099; 2100; 2103;

Vol. II, Stenographic proceeding of trial before Judge Anderson, Testimony of Caulfield, 549, 550;

Larson, A. R. 1772-3; 1779-1781; 1805-1806; 1842; 1880-1881; 2324.

(c) The Larson Company sought to deceive the public as to its identity, (1716-1718; 2176-8) and as to the extent of the premises occupied by it, (1717-1729; 1751-8; 7506-9) and also falsely asserted registration of its Wintermint trade-mark long before its actual registration (2240-1; Vol. II stenographic proceedings before Judge Anderson, pp. 427-450) and also sought, by false testimony to prevent the Master from allowing the Wrigley Company credit for its contingent liability with respect to its coupons, on the basis of a fifty-per-cent redemption.

(2640; 2641; 3293; 3268-3276; 3301-3306; 3347-3449; 4270-4278; Wrigley Exh. 12, Sheet A;

3458-9; 3469-3474; 4279-4286;

470 Twenty-Third: That the Master refused (on the objection of the Larson Company and over the Wrigley Company's exceptions) to allow the Wrigley Company to prove by L. P. Larson, Jr. (7057-7063; 7506-9) that the Larson Company duly entered into a contract, (over Larson's signature as President), with one Thomas P. Tivy, in the summer of 1914, whereby said Tivy agreed that, during the next five years he would purchase all the Larson Company's products, amounting to $89,700.00 during the first year of said contract and to $119,600.00 during the second year of said contract, and to $143,000. during the third year of said contract, and to $171,600. during the fourth year of said contract and to $205,920. during the fifth year of said contract (making a total of $729,820.00 for the entire five-year period), and that by said contract the Larson Company agreed not to sell, or cause to be sold any of its products without the consent of said Tivy for a period of said five years, and whereby said Tivy agreed to pay the Larson Company for its varions products from $20. to $30. per case for chewing gum, each case consisting of two thousand packages of gum, and each package containing five sticks, and whereby the Larson Company retained for itself the right to sell its products during said five years only within Cook County, Illinois, and at the time of entering into said contract with said Tivy the Larson Company had outstanding a contract with one H. S. Vandervoort giving the latter the exclusive right to sell all of the Larson Company's products in Cook County, Illinois; and that said contract with Tivy further provided that on the expiration of the Larson Company's said contract with Vandervoort, the Larson Company would not thereafter, within said five years, sell any of its products anywhere, even including Cook County, Illinois.

471 Twenty-Fourth:

That the Master concluded in said report, (pp. 5, 6) that losses sustained in previous years may not be deducted from profits made in 1917 and 1918;

Whereas, he ought to have concluded as a matter of law that such losses are deductible from such profits, and that the order of reference in this case so required.

Twenty-Fifth:

That the Master, in the trial of the cause, permitted (1) (over the exceptions of the Wrigley Company) L. P. Larson, Jr. to testify as to what occurred before Judge Carpenter on September 30, 1918, while an effort was being made to have a

decree entered in this suit (Rec. 8-12) and (2) likewise permitted Mrs. Lovelace to testify and received in evidence correspondence regarding the kind of decree which was to be entered herein (Rec. 12-25) and, (3) likewise received in evidence Larson Exhibits 1-9, both inclusive, (Rec. 8-251, 160-165);

Whereas, the Master should not have received any of said evidence inasmuch as none of it was competent, relevant or material to any matter which was referred to the Master.

Twenty-Sixth: (Interest on Award, Report, pp. 49-51)

That the Master has in said report (pp. 49-51) concluded and stated that the allowance of interest, the rate thereof, and the time from which it shall begin to run, in accounting cases, lies in the sound discretion of the court, and (p. 50 of report) that from the close of the accounting period to the present time the Wrigley Company has retained profits earned by Doublemint during the accounting period, and used
472 them in its business and received the benefit therefrom in all respects the same as if the profits belonged to it, and that during this time Larson has been deprived of any benefit from the use of such profits, and that it would be inequitable for Wrigley to take Larson's profits and use them while the litigation proceeded, without paying interest thereon.

Whereas, the evidence showed and the Master ought to have found and concluded that Wrigley retained no such profits and rightfully took its position that no profits were earned and the Master should have concluded that Larson has not been deprived of the benefit of any such profits, (See references under Exception Seventh) and is not entitled to interest, and that under the order of reference he has no concern with the question as to whether or not interest should be allowed on an award or finding of profits, or from what time, or at what rate it should be allowed, if at all, and that those are questions to be passed upon in this case in the first instance by the court and not by the Master; and that if the Master had the power to make any finding or recommendation relating to interest on the amount of his finding of profits in this case, then he should have found and concluded that interest would not begin to run in such a case as this, prior to an adjudication of the amount of profits and gains, if any.

Twenty-Seventh: (Compensation of Accountants, Report pp. 55, 56).

(a) That the Master has found and concluded in his Report (p. 55) that $7,359.50, the amount of Auditor James Hall's

bill, should be taxed as costs in the case and be paid by the Wrigley Company, with six per cent. interest from the date of filing the Master's Report;

Whereas, the evidence shows and the Master should
473 have found and concluded that no part of said bill should be taxed as costs against, or should be paid by the Wrigley Company, but that said bill should be paid by the Larson Company, because it was incurred by and for the benefit of the Larson Company, and was unnecessarily incurred.

See references under Exceptions, Seventh, supra, Twenty-seventh, (5), infra.
4137-9; 4161; 222-5;

(b) That the Master has found and concluded in said Report (p. 56) that the amount charged by Touche Niven & Co. for their services in this accounting is a fair and reasonable amount and is not in dispute;

Whereas, the Master should have concluded that the matter of compensating Touche Niven & Co. has not been referred to him, and that he has no authority, or power to investigate said matter, or to make any report thereon, and that the Wrigley Company duly objected to the Master making any inquiry as to that subject matter, and that said objection should be sustained; (7691-2; Report p. 56)

(c) That the Master has found and concluded in said Report (p. 56) that the account filed by the Wrigley Company under Equity Rule 63 did not properly state the results of the business, and that Touche Niven & Co. performed the services for which it has charged in a skillful and proper manner;

Whereas, the evidence proved and the Master should have found and concluded:

(1), That the account filed by the Wrigley Company under Equity Rule 63 properly showed that the Wrigley Company earned no profits during the accounting period from the manufacture and sale of its Doublemint Gum in the enjoined dress.

(See references under Exception, Seventh).

474 (2) That the service rendered by Touche Niven & Co. were not rendered in a skillful, or fair, or proper manner.

Larson Exh. 132, p. 5; Exhibits "C" and "O";
Stanley 6303-6311; 6370-6377; 6431-6459; 6462-3.
(Vicent, 7574-7590;
Wrigley Exh. 92, Benington 1, p. 26
Wrigley Exh. 92, Benington 1, p. 72
Marwick, Mitchell, Peet & Co., report, p. 103;
Larson Exh. 132, p. 30; Exh. B;

Wrigley Exh. 11; Vincent: 4262-8; (4267)
(4267)
Whitworth: 4279-4286; 3458; 3469-3474; 3139;
Vincent: 2641; 3305; 3268-3276; 4270-4278; 3292-3296;
Larson Exh. 132, pp. 5-12
Vincent: 3393, 3022-4; 2906-2911; 3004-6; 3318; 2897-8; 2811; 3025-3045; 3228-3254; 2893-5;
Hagberg: 3359-3379; 3393-5; 3167;
Vincent: 6472; 6473;
Stanley.: 6452-3 6457-9;

(d) That the Master has, in said Report (p. 55) found and stated that the account filed by the Wrigley Company under Equity Rule 63 was such as to make it necessary or proper for the incurring of such expenses for accountants as the Master finds were incurred by the Larson Company;

Whereas, the evidence shows and the Master should have found:

(1) That the filed account showed separately, cost of production, sales, receipts therefrom and gross profits, all of which were accepted as correct by counsel for the Larson Company (A. R. 228. Dec. 10, 1918) and by the Master in said report (p. 9), and the filed account also showed, in appropriate groups, all expenses which were deducted from gross profits.

(2) That the Wrigley Company at all times during the accounting proceedings freely and voluntarily made all its books and records and all information available to the Master, to the accountants appointed by him and to the various accountants of the Larson Company; and offered to produce any documents and to prepare any information which the
475 Master or Counsel for the Larson Company might think would have any bearing upon the accounting.

Wrigley:—213;
Hagberg:—3369-70; 3372;
Stanley:—851; 6137-9; 6233; 6267; 6293; 6336; 6466-7; 7398, 9;
Vincent:—2729; 2730
Statement of Wrigley's counsel: 343; 344; 7519; 7520; 7647;
Benington:—7648; 7649; 7657-9;
Paine:—140; 143-8; 177-180.

(3) That Wrigley Company's books and records were so kept as to properly reflect the business of the Wrigley Company (as is admitted b ythe accountants for the Larson Com-

pany); Vincent:—3016-17; 3033-4; 3283-4; 3291; 2783-8; 2793-2809; 2890; 3006-3017; 3360; 3326; 3327; Hagberg:—3373; Paine: 128; 129; 2607-8.

(4) That the Wrigley Company's books and records were kept in such a manner as to enable a proper segregation therefrom of all of items of receipts, disbursements and expenses pertaining to the manufacture and sale of Doublemint gum during the accounting period.

Cox:—56-8; 65; 66.
Buck:—102; 82, 8, 93, 5.
Eckerly:—124; 125.
Paine:—140;
Stanley:—6232-7; 6072; 6073; 607-609; 840-851; 886-898; 1032-1040; 1131-1134; 1140-1141; 1171-1177.
Benington:—6902; 7254; 7255.
Wrigley Ex. 92, Benington 1, p. 3

(5) That the Master could and should have found and concluded that most of the work done by Touche Niven & Co. was unnecessary and that practically all of Touche Niven & Company's investigation was in an endeavor to support the Larson Company's groundless objections to the filed report.

Vincent: 2895-6; 3025-3254-3263; 3318; 2753-5; 3048; 3054-9; 3016-7; 2766-2809;
Whitworth: 3157; 3159-3161; 3409.
Hagberg: 3359; 3360; 3386-3395.
Mr. Aldrich's statement: (Dec. 10, 1918) 228.

(e) That the Master, (on objection of the Larson Company, and over the Wrigley Company's exceptions) refused to receive competent evidence offered by the Wrigley Com-
476 pany, which, if received, would have proven that while Touche Niven & Company's report, Larson Exhibit 132, was being prepared by it, that firm was and had been the auditors for the Jewel Tea Company for some years and knew, while preparing their said report, that the Jewel Tea Company were issuing profit sharing coupons and setting up reserves on account of a liability because of their issuance, and that the Jewel Tea Company quit issuing coupons in 1916, and that their coupons continued to come in for redemption at all times thereafter.

Whitworth: 4279-4286; 3458; 3469-3474.
Vincent: 2641; 3305; 3268-3276; 4270-4278; 3292-3296.

And if said evidence had been received by the Master it would have shown the bias and unfairness of said Touche

Niven & Company's report and of their conclusions with regard to what would be a proper amount to allow the Wrigley Company on account of its contingent liability because of its issuance of United Profit Sharing coupons in connection with its Doublemint business during the accounting period.

(f) That the Master has in said Report (p. 56) recommended that the Wrigley Company be required to pay to the Larson Company $17,591.21, the amount of Touche Niven & Company's bill, together with interest thereon at the rate of six per cent, from the filing of said report;

Whereas, the evidence showed and the Master should have found and concluded, if it was within his power and authority to make any finding at all on the subject, (which is denied) that Touche Niven & Company's bill for services should not, nor should any part thereof, be paid by the Wrigley Company. (See references under Exceptions, Seventh, Twenty-seventh, (b), (e), supra).

477 Twenty-eight: (Canadian and Australian Corporation, Rep. p. 52)

(a) That the Master in said Report (pp. 25, 52-54) stated and found that the Canadian and Australian Corporations have been treated as instrumentalities of the Wrigley Company, through which its business was carired on in Canada and Australia;

Whereas, the evidence showed and the Master should have found

(1), That the Canadian and Australian corporations were separate, independent corporations, and that neither of them was organized in bad faith or for a sinister purpose (1224-5; 2467), and that neither of them was an arm, agency, branch, department, or instrumentality of the Wrigley Company, or in fact dominated or controlled by it.

Cox: 41; 42; 43; 45; 47; 49;
Buck: 360;
Stanley: 977; 988; 991; 992; 1016-28; 1125-7; 1144-5 1216-1265;
Wrigley: 212-14; 216-18; 245; 286; 289;
List of Stockholders and Directors, etc. 283-6; 245-283.
Rulings of Master 2467; 1222-5; 2467-74; 7636; 4165.
Mr. Aldrich's Admissions: 1789; 1790.

(2), And the evidence showed and the Master should have found that all of the Canadian and Australian sales, and the manufacturing cost thereof, as well as all domestic sales and

all sales in all countries foreign to the United States, and the manufacturing cost thereof, are included in the reported gross sales of $8,917,286.90 of Doublemint gum made during the accounting period, and in the manufacturing cost thereof,—$3,764,597.58, except such sales and manufacturing cost thereof, as were made by the Canadian and Australian corporations; (542) and that it is conceded by the Larson Company that it sold no Larson's Wintermint gum in Canada or in Australia, (1789, 1790) at any time during the accounting period, or previous thereto.

(3), That the Wrigley Company objected to filing any account of the business done by either the Canadian or Australian corporation, on the ground that the order of reference did not authorize the Master to direct it (2468), and that the Companies were separate and independent, (See 478 references under Exception Twenty-eighth, (a), (1), supra, Report p. 53), and that the business done by those foreign corporations was in territory in which the Larson Company had never sold any Wintermint gum or other gum, and was unknown.

Objections 88 in "Objection Exhibit A".

(b) That the Master refused, (on objection of the Larson Company and over the Wrigley Company's exception) to allow the Wrigley Company to prove by competent witnesses (1222-1229) that the Australian Company was incorporated on the suggestion of William H. Stanley, and that he at that time, had no connection with the litigation now on hearing, was not familiar with it, and was not then aware that there was any effort on the part of the Larson Company to produce an accounting from the Wrigley Company; and that the sole purpose of incorporating the Australian Company was because of either actual or threatened heavy duties about to be imposed, in the summer of 1915, by the Australian Government, upon the importation of gum into Australia so as to render the prosecution of the gum business by the Wrigley Company in Australia impracticable and unprofitable, and that, at that time, the Wrigley Company had already shipped machinery to Australia and was in the process of erecting a gum-making plant in Australia and that it was then concluded by the Wrigley Company (the West Virginia Company) to discontinue the completion of that factory and to discontinue its gum business in Australia; and that there was no intention on the part of said West Virginia Company

to organize the Australian Company in order to interfere with any possible decree that might be entered in this suit, and that the organization of the Canadian Company had no relation whatsoever to the Larson Company's litigation with the Wrigley Company. (1264).

479 (c) That the Master ordered the Wrigley Company to file an account of the profits of the Canadian corporation from the sale of its Doublemint gum:

Whereas, he ought to have found and concluded that the Wrigley Company should not account for such profits, if any, and that the Wrigley Company, at the time of complying with said order, duly objected and excepted thereto. (See references under Exception Twenty-eight, (a),—(1), (3); (b), supra.)

(d) That the Master ordered the Wrigley Company to file an account of the profits of the Australian corporation from the sale of its Doublemint gum:

Whereas, he ought to have found and concluded that the Wrigley Company should not account for such profits, if any, and that the Wrigley Company, at the time of complying with said order, duly objected and excepted thereto. (See references under Exception Twenty-eight, (a)—(1), (3): (b), supra.)

(e) That the Master in said Report (p. 54) has concluded to retain jurisdiction over the accounting of the Doublemint business of the Canadian and Australian corporations:

Whereas, the record shows and the Master should have found and concluded that from the time of the filing of the accounts of the Canadian and Australian Companies (ordered by the Master Oct. 17, 1921 A. R. 2474) and even previous thereto (Argument Feb. 6, 1922, referred to A. R. 2880, 2881; —Argument June 15, 1922, and especially page 16, et seq. thereof A. R. 5216-5219, Nov. 1, 1922; 7632-6) the Wrigley Company insisted on the Larson Company making such proofs as it deemed advisable relative to these Canadian and Australian filed accounts, in order that the whole case might be submitted to the various Courts as one matter, instead of "piece meal", as otherwise it would require "piece meal"

480 court hearings; and the Master should have concluded that the Larson Company is not entitled to have any further proceedings before the Master concerning the Canadian account, filed April 21, 1922 (4161) and Australian account filed July 6, 1922, for the reasons stated in our objections to

the filing of the reports of the Canadian and Australian companies' business, and the Master should have returned said report with his report.

Twenty-ninth: That the Master in his said Report (p. 57) overruled the Wrigley Company's Suggestions, Objections, Requests and Exceptions, ("Objection Exhibit 'A' ") filed with the Master on November 1, 1923, to his draft report, and stood by his said draft report;

Whereas, the Master should have followed and complied with each and every of the suggestions and requests contained in said "Objection Exhibit A", and he should have sustained each and every of the objections contained therein. (See references under prior Exceptions).

Thirtieth: That the Master, in his report, ought to have concluded and recommended that the amounts found by him (Report, p. 67) to have been paid to him and to the reporter, should be taxed against and be paid by the Larson Company.

Thirty-first: And as a further and final exception, the Wm. Wrigley Jr. Company says that the Master in his report completely misinterpreted and misapplied the decree of reference in concluding that the Wrigley Company was required to account for all Doublemint profits regardless of whether or not they were due to the enjoined dress;

Whereas, under the evidence and the decisions of the Supreme Court of the United States the Master should
481 have found that no award has, as yet, been made in this case by any court, and that there has been no decision of any court awarding any of the Wrigley Company's profits to the Larson Company, and the Master should also have found and concluded that, by the decree of reference, he was limited to the taking of an account of only such gains and profits, if any, as were due to the enjoined dress, and that there was not a scintilla of evidence showing that any sales, profits or gains were in any manner due to, or influenced by the enjoined dress, but, on the contrary the Master erroneously rejected the Wrigley Company's offer to prove, by admittedly competent witnesses having knowledge of the facts, that every purchaser of Wrigley's Doublemint Gum purchased the same as and for the Wrigley Company's product and because it was made by the Wrigley Company; and the Master should have found that the Larson Company is not entitled to recover any profits or gains and he should have recommended the entry of a decree

accordingly. (See references under Exceptions First to Seventh, both inclusive, supra).

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors for the Wm. Wrigley Jr. Company.

Dated, Chicago, Ill., December 3, 1923.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors and of Counsel for Wm. Wrigley, Jr. Company.

Filed Dec. 3, 1923, John H. R. Jamar, Clerk.

1512 And afterwards on, to wit, the 20th day of February, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Feb. 20, 1925.

1513 • • • 488 • • •

Friday, February 20, 1925.

Present: Honorable James H. Wilkerson, Judge of Said Court:

This cause coming on to be heard on the motion heretofore entered herein for Entry of Decree and motion for appeal on behalf of L. P. Larson Jr. Company, and the Court now here after hearing arguments of counsel said motion is taken under advisement by the Court.

1514 And afterwards on, to wit, the 7th day of March, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Mar. 7, 1925.

1515 • • • 488 • • •

Saturday, March 7, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

It Is Ordered by the Court that the decision heretofore filed herein on December 8, A. D. 1924 be and the same is hereby withdrawn.

Entered Mar. 14, 1925.

1516 And afterwards on, to wit, the 14th day of March, 1925 this matter coming on to be heard, the following order was entered by the Court:

1517 * * * 488 * * *

Saturday, March 14, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

This cause coming on to be heard upon the motion of entry of a decree and motion for appeal and after arguments of counsel said motion is continued to be taken up upon notice.

Entered Mar. 14, 1925.

1518 And afterwards on, to wit, the 14th day of March, 1925 this matter coming on to be heard, the following order was entered by the Court:

1519 * * * 488 * * *

Saturday, March 14, 1925.

Present: Honorable James H. Wilkerson, Judge of Said Court:

On motion of said William Wrigley Jr. Company, the plaintiff herein and defendant to the counterclaim, due notice hereof having been given to said L. P. Larson Jr. Company, the defendant and counterclaimant herein.

It Is Hereby Ordered that all exhibits stated by Master in Chancery Charles B. Morrison in his report filed herein on November 13, 1923 to have been retained by the parties or to be subject to the order of the court, and all exhibits which were introduced or offered in evidence in the proceedings in this cause before said Master, as shown in his said report together with the transcript of the evidence and proceedings and the objections, accounts, reports and all documents which said Master in said report stated he returns therewith, be, and the court finds that they have been filed herein for the consideration of the court on the hearing of the exceptions heretofore filed herein by said plaintiff to said Master's report.

Enter:

JAMES H. WILKERSON,
Judge.

March 14, 1925.

1520 And on to wit: the 14th day of March, 1925, there was filed in the Clerk's Office of said Court a certain Decision on Exceptions to Master's Report, in words and figures following, to wit: Filed Mar. 14, 1925.

1521 * * * 488 * * *

DECISION ON EXCEPTIONS TO MASTER'S REPORT.

This case is now before the Court on exceptions to the Master's report on accounting.

It has been in the Circuit Court of Appeals twice (253 Fed. 914; 275 Fed. 535) and the disposition of the questions now presented requires an examination of those proceedings to determine what has been laid down as the law of this case to be here followed.

The parties are corporations, The plaintiff and defendant to the counter-claim will be referred to here as Wrigley Company; the defendant and counter-claimant will be referred to as Larson Company;

1522 In 1911 Wrigley Company brought suit against Larson Company charging unfair competition and infringement of trademark. It alleged that in 1894 it originated the distinguishing name of spearmint in connection with chewing gum products, adopted a novel form of trade dress for its spearmint product, and thereafter extensively advertised the name and dress. It charged that Larson Company had placed on the market under the trade name of peptomint a product with a flagrant and fraudulent imitation of the spearmint trade dress and that as a matter of fact the purchasing public made no distinguishment between spearmint and peptomint. The bill was verified and upon the showing made Wrigley Company obtained a temporary injunction restraining Larson Company from using the label against which complaint was made, or any similar label. This injunction continued in force until the entry of the final decree dismissing the bill.

While the injunction against peptomint was in force Larson Company brought out its wintermint package and originated the wrappers and color scheme. Wrigley Company in 1914 put on the market its doublemint package and on June 15, 1915, brought its second suit against Larson Company, the one out of which this accounting proceeding arises. The bill contains substantially the same averments as the first bill with

reference to the adoption and use of the distinguishing name spearmint, and sets out the granting of the temporary injunction in that case. It further alleges that about July 1, 1914, Wrigley Company placed upon the market a pepermint flavored chewing gum product, and, desiring to distinguish that product by name from all similar flavored chewing gum products then upon the market, adopted and used the trade name or mark of doublemint, the bill then states:

"The said defendant first began the sale of its wintermint product subsequent to the time the said doublemint
1523 product of your orator came upon the market, and said defendant had never marketed or sold chewing gum in cartons, counter-bands or wrappers in the trade dress of wintermint gum, herein in evidence, prior to the introduction of your orator's doublemint product, and that the said defendant has simulated the style of lettering, peculiar markings, form of carton, form of wrapping and general color scheme, thereby producing and giving to its style of package, counter-band and wrappers, the peculiar visual appearance of both your orator's spearmint and doublemint products and either of them and which through long years of usage and great expenditures of money, in advertising, have become the predominating means of designating your orator's well known spearmint and doublemint products; your orator further averring upon information and belief that a certain number of dealers in chewing gum both the wholesale jobbers and the retail dealer, can be found who have purchased the said packages of chewing gum known as wintermint from the defendant; for the purpose of palming off the defendant's goods upon the public as the goods of your orator, and that these defendants have found as a matter of fact, that the purchasing public makes no distinguishment between the two packages and that the wintermint gum product of this defendant can be palmed off on the public and trade generally as either the product spearmint or the product doublemint of your orator".

Larson Company in its answer charged that one Pulver and not Wrigley Company was the originator of the spearmint package, that the injunction in the first case was obtained by false testimony and that Larson Company had been oppressed by Wrigley Company by means of deception wilfully and fraudulently practised upon the court. As to the doublemint package Larson Company's answer accepted the averment of the bill as to identity, the allegations being as follows:

"This defendant admits that the purchasing public makes

no distinguishment between the packages of doublemint as manufactured and sold by complainant, and the wintermint gum product of this defendant, and that the complainant is able to and does palm off upon the public and trade generally its product doublemint as the wintermint of this defendant".

Larson Company charged, however, that wintermint was brought out by it before Wrigley Company had brought out doublemint; that Wrigley Company had brought out doublemint for the purpose of undermining Larson Company's established and growing trade in wintermint and in its counter-claim sought affirmative relief on that basis.

Court. The decrees were against Wrigley Company 1524 The cases were consolidated for trial in the District on both of its bills. and in the second case the decree was likewise against Larson Company on its counter-claim. In the Circuit Court of Appeals the decrees against Wrigley Company were affirmed Speaking of Wrigley Company's claims based upon the assertion that it was the originator of the spearmint package the Court said;

"Wrigley's oppression of his opponent and his attempt to deceive the Court were ample grounds for refusing him relief in equity",

As to the doublemint package the Court of Appeals held that the evidence proved with certainty that wintermint was seven months older than doublemint. Upon the issue of confusion the Court pointed out that in support of the counter-claim no proof was made of actual confusion; and that with nothing but the packages before them the Court would be inclined to concur in the finding of the District Court. The Court then said:

"But the record contains also Wrigley's averment in his bill that confusion had arisen. There was no proof to support that averment and Larson's parallel averment. But Larson's counsel may have relieved upon the stipulation of fact in bill and counter-claim to save hunting up and bringing in witnesses of wrongful sales. Furthermore, Wrigley and another interested with him gave testimony as experts in the gum business that confusion was likely to result from the similarities. And so there is a basis for at least the possibility that Wrigley's averment of fact and his expert opinion may be true and that Larson's diminished sales came from simulation of the wintermint package. In such a situation, the rule, in our judgment is this: In a real and legitimate controversy, a party should be left without the

knot of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc. and that under no circumstances could the averments and admissions be true. This is in analogy to the rule respecting the sustaining of a demurrer to a bill for infringement of a patent on account of the invalidity of the patent on its face".

That portion of the decree dismissing Larson Company's counterclaim therefore, was reversed, and the case remanded to the District Court with direction to enter an injunc-1525 and order an accounting.

Upon the filing of the mandate an interlocutory decree for injunction and accounting was entered on October 14, 1918. The cause was referred to the master

"to take an account of all the gains and profits of William Wrigley Jr., Company to it accruing or arising from the manufacture and sale of its doublemint gum in the dress hereinbefore enjoined from its first sale on July 28, 1914, to the date of the entry of this decree and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until compliance therewith."

The decree further provides for the employment of accountants to examine Wrigley Company's books and papers

"to ascertain the profits, if any accruing to said company from the sale of doublemint as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenditures."

During the progress of the accounting before the master Wrigley Company contended that the decree for an accounting extended only to territory in which Larson Company had carried on its trade or in which it had the ability and intention to extend it. Wrigley Company claimed the right to examine the officers and books of Larson Company in support of this contention and was sustained by the master, Larson Company finally refused to submit to further examination and the question was brought before the District Court by certificate and the ruling of the master was there upheld. From that order of the District Court an appeal was taken to the Circuit Court of Appeals. A petition also was filed in the Circuit Court of Appeals for a writ of mandamus to require the District Court to control the action of the master.

The Circuit Court of Appeals reversed the ruling of the District Court and awarded the Writ. (275 Feb. 535). The Court said:

1526 "Inasmuch as the decree specifically directs the master to take an account of all of Wrigley Company's gains and profits from the manufacture and sale of doublemint gum and submits no other matter for his report, his duty to refrain from excursions should be sufficiently apparent".

The Court then proceeded to examine and decide, the question whether the territorial limitation issue had been adjudicated. The Court held that the injunction had been ordered on the former appeal because in Wrigley Company's spearmint suit it had obtained a pendente lite injunction against Larson Company's peptomint gum by wilfully deceiving the Court, and had thereby appressed its opponent; that Larson Company, while its trade was stopped by that wrongful injunction, brought out its wintermint gum; that before wintermint trade could be well established Wrigley Company put its doublemint on the market for the purpose of forestalling Larson Company's growing trade in wintermint; that Wrigley Company thereupon sued for an injunction against wintermint on the grounds that doublemint was the elder product, and that the two were one and the same in the eyes of the trade; that Larson Company by answer and counterclaim, agreed with Wrigley Company that the two pacakages were substantially the same, but asserted that wintermint was the elder; that wintermint was in fact the elder; that Wrigley Company, before adopting and bringing out its doublemint, had knowledge of Larson Company's wintermint; that both parties were bound by their sworn pledges; and Wrigley Company additionally by the testimony of its own offices, to the fact that the two articles were one and the same in the eyes on the trade. The Court continued;

"Looking to Larson Company's legal rights flowing from these adjudicated issues of fact, we found Larson Company entitled in law and equity to a perpetual and universal injunction against Wrigley Company's doublemint; and in adjudicating that issue of law (or mixed conclusion of fact and law) we, necessarily adjudicated the following subordinate or fundamental issues averred in the pleadings and covered

1527 by the finding of facts, though we did not deem it necessary to enumerate them: That Larson Company was the owner of the common package and had the exclusive right to make and sell it; that Wrigley Company, knowingly and

wilfully, trespassed upon Larson Company's rights; that Wrigley Company was intentionally forestalling Larson Company; that Wrigley Company thereby constituted itself the agent of Larson Company in making and selling the common package that was the property of Larson Company; that Larson Company was therefore, entitled to stop the activities of its self-constituted agent. And although Wrigley Company in its pleadings did not directly tender the territorial issue, that issue was substantially included in Wrigley Company's general denial of Larson Company's allegation that everywhere that Wrigley Company went it was putting Larson Company's product on the market.

"Now it is true that the order to the master to take an accounting of all of Wrigley Company's profits from making and selling doublemint is interlocutory and therefore, no question arising out of such an accounting is reviewable in this Court until after the District Court shall finally have disposed of the master's report. But that does not authorize the master to open any quesion of fact or of law that was adjudicated in the decree of perpetual and universal injunction."

The mandate from the Circut Court of Appeals required the entry of an order limiting the inquiry before the master to the ascertainment of profits, if any, made by Wrigley Company from the manufacture and sale of doublemint gum in the infringing dress as prescribed in the decree and directing him to proceed with the accounting in accordance with the opinion of the Court.

The master, as he makes clear in his report, then proceeded upon the understanding that the Circuit Court of Appeals had considered and decided, not only the right of Larson Company to an injunction universal in its terms and its right to require Wrigley Company to file an account equally broad in its scope, but also the principles which were to control the accounting. He took the interlocutory decree, in view of the mandate and opinion in the second case, to be in effect an award to Larson Company of all profits arising from the doublemint business.

1528 On that basis he found that there is due Larson Company $2,860,083.66 with interest at the rate of six per cent per annum from the end of the accounting period, November 12, 1918, to the time of the entry of the final decree. The account, as stated by the master, does not take into consideration doublemint business in Canada, which was

done by Wm. Wrigley Company, Limited, a Canadian corporation, and business done in Australia by Wm. Wrigley Company, Proprietary Limited, an Australian corporation. The claim against the Australian corporation has been withdrawn, and the claim on account of the business of the Canadian corporation will be hereafter considered.

Larson Company had filed no exceptions to the report. The exceptions of Wrigley Company fall into two general groups. Those of one group question the master's interpretation of the orders and opinions of the Circuit Court of Appeals and the general rules applied by him in determining the liability of Wrigley Company. Those of the other group relate to the rulings of the master with reference to deductions which it is claimed should be made from the gross profits on doubelmint in determining the amount of profits to be recovered in this case.

In support of the first group of exceptions Wrigley Company asserts that the master has misconceived the effect of the opinions and orders of the Circuit Court of Appeals; that the questions decided on those appeals were necessarily limited to the right of Larson Company to an injunction and accounting that the decree for an accounting was interlocutory; that the taking of the account of profits directed by that decree is an entirely different matter from the determination of the right of Larson Company to recover all or a part of such profits; that questions touching the right to the recovery are left open by the Court of Appeals and should be decided by this Court upon the general rules applicables
1529 to such recoveries, uncontrolled by anything which the Court of Appeals has said in deciding the right to an injunction and accounting. Insisting upon what it contends are well established principals in unfair competition cases, Wrigley Company further asserts that Larson Company has failed to sustain the burden of showing that any gains or profits were due to the enjoined dress or that such profits were incapable of separation; and that the master failed to give consideration to evidence taken and offered showing that all of the sales and profits of Wrigley Company were made from other causes than the enjoined dress. Complaint is also made that the master refused to allow deductions for gum marked with the name of Wrigley Company as the manufacturer thereof.

Was the question of the right of Larson Company to recover all the profits on doublemint decided by the Circuit

Court of Appeals so that it is the law of this case, and, therefore, binding upon this Court?

We are not dealing here with the application of the rules relative to the law of the case to the effect of previous orders on the later action of the court rendering them in the same case. (*Messinger* v. *Anderson*, 225 U. S. 436). Nor do we have the question of the duty of a lower court to follow the opinion of a reviewing court in a case remanded for further proceedings, when, subsequent to the rendition of the opinion, the reviewing court or a court which has the power to review its orders, has laid down principles of law inconsistent with those stated in the opinion. We have here the plain, direct question of the duty of a lower court to follow the mandate and opinion of the reviewing court, unaffected by any other considerations; and the rule in that respect is clear.

Every question of law or fact which was before the Circuit Court of Appeals and decided by their opinions was thereby conclusively settled for this Court upon the subsequent
1530 proceedings. The matters are not decided on those appeals are open for consideration here: but so far as questions of fact or law are specifically decided this Court is not at liberty to re-examine any such decided matters but must proceed in conformity to the mandate as interpreted by the opinion of the reviewing court. No other rule is conceivable, having regard to the putting of an end to litigation. (*In re Potts, Petitioner*, 166 U. S. 263, 265; *in re Sanford Tool Co.*, 160 U. S. 247, 255; *Roberts* v. *Cooper*, 20 How. 467, 481; *Skillern* v. *May* 6 Cranch, 467; *Brown* v. *Lanyon Zinc Co.* 179 Fed. 309 310; *Messinger* v. *Anderson*, 171 Fed. 785, 789; *Bissell Carpet Sweeper Co.* v. *Goshen Sweeper Co.*, 72 Fed. 545, 552.)

In *Sanford Fork and Tool Co.*, 160 U. S. 247, it was said (p.256):

"The opinion delivered by this Court, at the time of rendering this decree, may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate and to act accordingly."

In *Bissell Carpet Sweeper Co.* v. *Goshen Sweeper Co.* 72 Fed. 545, the Court of Appeals, upon a former appeal, had affirmed a preliminary injunction but in so doing it had decided questions going to the merits of the case as well as those relating to the abuse of discretion by the trial judge in granting the injunction. It was held that reference must be made

in executing the mandate to the opinion of the Court, and that the decision on the questions which were in fact considered and decided became the law of the case and was binding upon the lower court. And in *Brown* v. *Lanyon Zinc Co. supra,* it was said

"We are requested to reconsider our prior ruling that no infringement resulted from the use of the Cappeau type of furnace with the rabble operating mechanism in an open or unenclosed place underneath the main roasting chamber, but this we may not do. That ruling turned upon the interpretation of the claim in suit and is now a part of the law of the case whether it was right or wrong. It was adhered to after due consideration of a timely petition for rehearing, and 1531 the Circuit Court, as in duty bound, has respected and enforced it in the subsequent proceedings, True, it was made upon an appeal from the interlocutory decree granting an injunction, but that did not render it less obligatory upon the Circuit Court, and does not except it from the settled rule that propositions once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal or writ of error. (Citing cases)"

Nor is the finality of the decision of the reviewing court, so far as it did decide any question, affected by the fact that it was a judgment reversing the lower court. (*Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551, 553; *Messinger* v. *Anderson, supra*; *Haley* v. *Kilpatrick,* 104 Feb. 6, 47; *Lesse* v. *Clark,* 20 Cal. 387.)

In *Mutual Life Insurance Co.* v. *Hill, supra,* it was said (p. 553):

"When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions, while undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by

the appellate court for any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for further action in the case."

In *Leese* v. *Clark, supra,* Mr. Justice Field, then Chief Justice of the Supreme Court of California, delivering the unanimous judgment of that court, said:

"The decision of this Court on the first appeal became the law of the case, and fixed the right of the parties in this action under their respective grants. 'A previous ruling of the appellate court,' as we held in *Phelan* v. *City & County of San Francisco,* upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves,' 20 Cal. 39. Such has been the uniform doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. See *Dewey* v. *Gray,* 2 Cal. 377; *Clary* v. *Hoagland,* 6 Cal. 687; 1532 *Gunther* v. *Laffan,* 7 Cal. 592; and *Davidson* v. *Dallas,* 15 Cal. 82. Nor is the doctrine peculiar to this court. It is the established doctrine of the supreme court of the United States and of the supreme courts of several of the states. *Sibbald* v. *U. S.,* 12 Pet. 491; 91 Ed. 1167; *Bridge Co.* v. *Stewart,* 3 How 413, 11 L. Ed. 658; *Russell* v. *LaRoque,* 13 Ala. 151. And the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This will not be contraverted. So, on the other hand, if, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the

remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone, and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below. *Young* v. *Frost*, 1 Md. 394; *McClellan* v. *Crook*, 7 Gill, 333".

In the trial court the bills of Wrigley Company and the counterclaim of Larson Company in the second suit were dismissed for want of equity. The Circuit Cout of Appeals, in sustaining the decree against Wrigley Company in the first suit, said:

"Wrigley's oppression of his opponent and his attempt to deceive the Court were ample grounds for refusing him relief in equity. And in strict law, when Wrigley is limited, as he must be, to his own name and the spear design, for displaying 'spearmint', Larson is not liable for using his own initials and the oblique banner across the circle for displaying 'Peptomint' ".

In the second suit the District Court had held, as stated by the Circuit Court of Appeals, that the distinctive words and marks were so dominating that the carless purchaser, desiring Larson's wintermint would not be misled into taking Wrigley's doublemint. "And," the Court continued, "with nothing before us but the package we would be inclined to concur in the finding."

1533 The Circuit Court of Appeals then proceeded to consider and decide the question of the effect of the pleadings. In deciding this it was necessary to determine whether the parties by their pleadings agreed upon the issue of actual or probable confusion, and were, therefore, bound by their averments; and, secondly, whether the Court could be compelled to accept and act upon such agreement. Rejecting the view that the Court could be compelled to act upon an agreement in the pleadings where the case is moot or feigned or collusive, the Court of Appeals found in view of the testimony adduced by Wrigley Company at the trial, the case on the counter-claim could not be regarded as moot or feigned or collusive, and that the parties were bound by the stipulation of fact in the bill and counter-claim. The averment which the Circuit Court of Appeals held to be binding upon the Wrigley Company is

"That the purchasing public makes no distinguishment between the two packages and that the wintermint gum products of this defendant can be palmed off on the public and

trade generally as either the product 'spearmint' or the product 'doublemint' of your orator."

The bill and counter-claim are pleadings upon which the final decree in this case must be entered, They are not limited in their scope to the issue of unfair competition involved in the entry of the interlocutory decree. They are the pleadings upon which the amount of the recovery, if one is had in the case, must be determined. The question of their construction and effect as pleadings in the case (not a fragment of the case but the whole case) was before the Court of Appeals just as the question of the construction and effect of the contract was before the court in *Leese* v. *Clark, supra.* The Court decided that question and held that in this suit Wrigley Company is bound by its averment that the purchasing public makes no distinguishment between the two packages.

It is true that, as pointed out in *Jones* v. *Moorehead,* 1 Wall. 155, 165: "The admission need go on further than 1534 its terms necessarily imply." The averment in the bill, however, was one which applies with equal force to every package of doublemint put on the market. It cannot be true as to one without being true as to all. It is charged that in the eyes of the trade Wrigley Company's doublemint and Larson Company's wintermint are identical. The stipulation in the pleadings here is not analogous to the admission in *Jones* v. *Morehead, supra.*

The question of the construction and effect of the stipulation in the pleadings was given consideration and again decided on the second appeal and in the mandamus proceeding. There the question was whether Wrigley Company should be required to account as to sales in terrritory in which Larson Company had not gone and in which it had neither the ability nor intention to extend its trade. The Circuit Court of Appeals pointed out that as the decree specifically directs the master to take an account of all profits he should have followed that direction. The decree, however, was interlocutory, The master's interpretation of the decree had been upheld by the District Court. The Court of Appeals, therefore, proceeded to determine whether or not the Court and master were following the mandate and opinion on the first appeal. In deciding that question it was for the Court of Appeals to consider its own mandate and that construction is, under the authorities above cited, binding upon this court as the law of the case. The Court of Appeals considered its mandate and opinion on the first appeal as having adjudicated that both

parties in this case are bound to the fact that the two articles are on and the same in the eyes of the trade.

Here is a construction of the pleadings in this case
1535 made by the Circuit Court of Appeals in connection with the accounting proceedings. That construction is that in determining the decree which is to be entered in this case the two packages, Wrigley Company's doublemint and Larson Company's wintermint, must be treated as identical. Applying that construction of the pleadings to the other facts in the case, the Circuit Court of Appeals held that it had been adjudicated; (1) That Larson Company was the owner of the common packages and had the exclusive right to make and sell it; (2) That Wrigley Company knowingly and wilfully trespassed upon Larson Company's rights; (3) That Wrigley Company was intentionally forestalling Larson Company; (4) That Wrigley Company was to be treated as the agent of Larson Company in making and selling the common package.

If the opinion of the Circuit Court of Appeals is followed as to the effect of the stipulation in the pleadings in its relation to the other facts of the case, the contentions of Wrigley Company as to the principles which should have been followed by the master cannot be accepted. The argument that the Court of Appeals went further in its decisions of the questions before it than it was required to go to sustain the ordrs which were made, does not aid Wrigley Company. The questions were in fact decided just as questions relating to the validity or infringement of a patent, or the construction of a contract were decided in the cases above cited, when the decision was not necessary to the determination of the issue immediately before the Court, and the decision, when made, is binding here and must be followed.

And the Court of Appeals could not have reached the conclusion which it did reach upon the second appeal and in the mandamus proceeding, without necessarily adjudicating the questions of actual confusion, agency and wilful tres-
1536 pass. Certainly compliance with the general terms of the interlocutory decree, which was subject to the control of the District Court, would not have been required by the Circuit Court of Appeals at the expense of months of time and thousands of dollars, as an idle ceremony. And, it seems clear, that without adjudicating in Larson's favor the questions which the Court of Appeals declares it did so adjudictate, there could have been no recovery by Larson Com-

pany, in view of the rule stated in *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, and *Straus* v. *Notaseme Co.*, 240 U. S. 179, of any of the profits on business outside the so-called common territory.

Let us apply the decision of the Circuit Court of Appeals upon the questions which it holds were adjudicated to the objections to the Master's report.

Wrigley Company asserts that the burden was on Larson Company to show that some profits were due to the enjoined dress and also to show that such profits were incapable of separation. The Court of Appeals, however, deciding the question of the construction and effect of the pleadings, has held that the parties to this suit are bound by their sworn pleadings to the fact that the two articles are one and the same in the eyes of the trade. The averment in the bill of Wrigley Company, which was accepted by Larson Company, that the purchasing public makes no distinguishment between the two packages even if it were not interpreted to apply to all sales of doublemint by Wrigley Company, certainly under the narrowest construction possible covers some sales.

It is a pleading not merely for the purpose of the interlocutory decree. It is the pleading upon which the case is to go to final decree. In any aspect it operates to relieve Larson Company from the burden of showing that some of the sales of Wrigley Company were due to the confusion resulting from its imitation of Larson Company's pack-
1537 age.

The impracticability, if not the utter impossibility, of separating the profits on sales in the making of which there was actual deception from those in which there was no confusion appears when we consider that it is the effect of the imitation upon the ultimate consumer which controls. In *Hanover Milling Co.* v. *Metcalf, supra*, the Supreme Court (p. 423) commented upon the test in unfair competition cases as follows:

"But Metsalf's purpose to take advantage of the reputation of the Hanover Company's Tea Rose flour is so manifest, and the tendency of the similarity of the brand and accompanying design, and the make-up of the packages, to mislead ultimate consumers is so evident, that it seems to us a case of unfair competition is made out."

In *Chickering, et al.* v. *Chickering & Sons, et al.*, 215 Fed. 490, 497, the Circuit Court of Appeals for this circuit quotes

with approval the following rule stated in *Wolf Bros. Co.* v. *Hamilton Brown Shoe Co.*, 206 Fed. 611, 617, as follows:

"It must be presumed that the retail merchant, receiving the shoes in these cartons, knew that shoes he was buying, and from whom. He would have known this in the absence of any carton. The appellee conceives that it has discharged its duty and obligation to the appellant, and to the public, if it has used means which would excuse it from the charge of having deceived its own customers. It says:

'We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes.'

Such is not the law. If a manufacturer or wholesale dealer willfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser. *Scheuer* v. *Muller, et al.* 74 Fed. 225; *Dennison Mfg. Co.* v. *Thomas Mfg. Co.*, 94 Fed. 651; *National Biscuit Co.* v. *Baker, et al.*, 95 Fed. 135; *Fairbank Co.* v. *Bell Mfg. Co.*, 77 Fed. 869; *Revere Rubber Co.* v. *Consolidated Hoof Pad Co.*, 139 Fed. 151; *Lever* v. *Goodwin*, L. R. Ch. Div. 1; *Gulden* v. *Chance, et al.*, 182 Fed. 303."

In view of the millions of ultimate consumers of the 1538 product here under consideration it would be impossible to separate the cases covered by the stipulation of fact in the pleadings, if that stipulation is considered and to extend to all sales, from those cases in which there was no confusion.

It must be borne in mind also that the Circuit Court of Appeals has adjudicated that Wrigley Company's imitation was deliberate and wilful. The rule concerning the recovery of profits in cases of deliberate and wilful infringement or imitation is stated in *Hamilton Shoe Co.* v. *Wolf Bros.* 240 U. S. 251, 261, as follows:

"And it is to be remembered that defendant does not stand as an innocent infringer. Not only do the findings of the Court of Appeals, supported by abundant evidence, show that the imitation of complainant's mark was fraudulent, but the profits included in the decree are confined to such as accrued to defendant through its presistance in the unlawful

simulation in the face of the very plain notice of complainant's rights that is contained in its bill. As was said by the Supreme Court of California in a similar case, *Graham* v. *Plate*, 40 California, 593, 598; 6 Am. Rep. 639, 640; 'In sales made under a simulated trademark it is impossible to decide how much of the profit resulted from the intrinsic value of the comodity in the market, and how much from the credit given to it by the trademark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the trademark. No one will deny that on every principle of reason and justice the owner of the trademark is entitled to so much of the profit as resulted from the use of the trademark. The difficulty lies in ascertaining what proportion of the profit is due to the trademark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trademark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong.' To the same effect are *Avery* v. *Meikle*, 85 Kentucky, 435, 448; 7 Am. St. Rep. 604, 610; *El Modello Cigar Co.* v. *Gato*, 25 Florida, 886, 915; 23 Am. St. Rep. 537, 544; 6 L. R. A. 823, 829; *Regis* v. *Jaynes*, 191 Massachusetts, 245, 249, 251; *Shoe Co.* v. *Shoe Co.*, 100 Maine, 461, 479; *Saxlehner* v. *Eisner & Mendelson Co.*, 138 Fed. Rep. 22, 24".

In the *Globe Wernicke Co.* v. *Safe-Cabinet Co.*, 144 N. E. 711, 713, there is the following statement of the rule:

1539 "The rule governing the rights of parties and the rule as to the measures of recovery, in cases of infringement of patents and cases of unfair competition, are quite similar, as disclosed in many authorities, among which the following may be cited. *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Sax-Lehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Hamilton Brown Shoe Co.* v. *Wolf Bros. Shoe Co.*, 240 U. S. 251, 36 Sup. Ct. 251, 60 L .Ed. 629; *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 36 Sup.

Ct. 357, 60 L. Ed. 713; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. Many other cases have been cited dealing with this proposition, from a consideration of which the rule may be deducted that where the wrong consists of such an infringement of a trademark of another, or such an imitation or simulation of the adopted name or the distinctive design, decoration, and appearance of the manufactured article of another, as to result in unfair competition, and the infringement or imitation is shown to be deliberate and wilful, the injured party is entitled to recover all the profits realized by the offending party upon the manufactured articles in question, * * * Cases in addition to those heretofore cited to the effect that under such circumstances the court will not undertake to apportion the profits gained from the manufacture and sale of such infringed or imitated product are *Benkert* v. *Feder* (C. C.), 34 Fed. 534; *Graham* v. *Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Callaghan* v. *Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. E. 547; *Saxlehner* v. *Siegle-Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77; *Regis* v. *Jaynes*, 191 Mass. 245, 77 N. E. 774, and *Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.*, 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960."

Another ground of objection to the master's report is the refusal of the master to receive and consider testimony tending to show that the ultimate purchasers bought doublemint because they desired the product of Wrigley Company; that each purchaser understood he was buying the product of Wrigley Company; and that Wrigley Company's sales of doublemint gum were due to the merits of its products, its reputation, and extensive advertising of doublemint, the use of the Wrigley name, trade-marks, wrappers, boxes, labels, coupons, etc., and were not due to any confusion or deception resulting from Wrigley Company's alleged imitation of Larson Company's package. Reliance is placed upon *Straus* v. *Notaseme Co., supra.* The Supreme Court there says that where unfair competition is shown it does not follow that defendants are chargeable with profits as a matter of course.

The Court continued:

1540 "So far as purchasers bought because the petitioners recommended the goods, or on the strength of the name, by whatever recommended, as distinguished from the colors and figures of the label, or from knowledge of the specific article, or from preference for full fashioned over seamless hose, or for any reason but the inducement of the red square,

bar and script supposed to indicate the plaintiff's hose, the plaintiff has no claim on the petitioners' profits."

The principles of the Straus case cannot be applied to sales by Wrigley Company without, in effect, setting aside the findings of the Circuit Court of Appeals upon the questions which it has said were adjudicated by it. In the Straus case it was stated by the Supreme Court that "the case is wholly devoid of any indication of actual intent to deceive". Here the Circuit Court of Appeals has ruled that the imitation was deliberate and wilful and that the acts of Wrigley Company were fraudulent and oppressive and has brought the case within the rule stated in *Hamilton Brown Shoe Co.* v. *Wolf Bros. supra*, and *Globe Wernicke Co.* v. *Safe-cabinet Co. supra.*

In the Straus case there was an absence of evidence that any deceit or substitution was accomplished in fact. Here the parties under the ruling of the Circuit Court of Appeals are bound by the stipulation in the pleadings that the two articles are one and the same in the eyes of the trade, and the Circuit Court of Appeals has adjudged that Larson Company was the owner of the common package. In order to make the principles of the Straus case applicable here it is necessary to hold that the stipulation in the pleadings is limited in its effect to the probability of confusion or at most to actual confusion in a number of cases sufficient to constitute unfair competition, and that the findings of the Circuit Court of Appeals as to the wilful, fraudulent and oppressive character of Wrigley Company's acts are unsustained by proof. Relief against the decision of the Circuit Court of Appeals cannot be obtained here.

1541 It is the duty of this Court to give effect to that decision and to enter the decree to which in law it necessarily leads.

As to the objection on the ground that the master failed to exclude profits on doublemint gum marked with the name of Wrigley Company as the manufacturer thereof, it is clear that Wrigley Company was in no position to raise that question before the master. The averment of confusion and deception in Wrigley Company's bill was general in terms. No distinction was drawn between the packages on which Wrigley Company was described as manufacturer and those on which, although its name appeared there, it was not so described. The entire wrapper is not annexed to the interlocutory decree, but in the petition for certiorari filed in the Supreme Court the package on which Wrigley Company is de-

scribed as manufacturer is treated as the one which is covered by the pleadings and which was before the Circuit Court of Appeals. The finding of the Circuit Court of Appeals that the packages were one and the same in the eyes of the trade applies without doubt to all doublemint packages regardless of the designation of Wrigley Company as manufacturer on the package. The case having been tried in the District Court and presented to the Circuit Court of Appeals on the theory that there was no substantial difference between the doublemint packages arising from the designation of Wrigley Company as manufacturer on some of them, the parties will not now be permitted to depart therefrom. (*M. K. & T. Railroad Co.* v. *Wilhoit*, 160 Fed. 441, 443, and cases cited.)

The remaining exceptions relates to the deductions from gross profits made by the master in determining the profits of Wrigley Company on doublemint pursuant to the directions of the interlocutory decree.

1542 A preliminary question arises as to the weight which is to be given to the master's report. Counsel for Larson Company, citing *Davis* v. *Schwartz*, 155 U. S., 631, 636, 637, and kindred cases, invoke the rule that so far as the findings depend upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the findings, the master's report must be treated as unassailable. This is the rule in cases in which there has been a reference by consent to report the facts of the case.

The reference here, however, cannot be treated as a consent reference within the meaning of the cases just referred to. The interlocutory decree was entered pursuant to the mandate of the Circuit Court of Appeals. The reference to the master to take the account was in accordance with the 59th Equity Rule. Consent to the form of the order or to the master who was to take the account was not a consent to the reference. The reference was required by the mandate and the rule of court. Objection would have been futile. The parties did not agree upon a special tribunal for the settlement of their controversy. They went before the master under the compulsion of the mandate and the equity rule.

While the findings of fact in the report of the master upon a reference taken pursuant to the rule applicable in matters of accounting are not unassailable, and while in a sense they are advisory only they do have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on the

part of the master. There can be no doubt as to the duty of the court with reference to the exceptions to the report of the master on such a reference. The parties are entitled to have the exceptions considered and to invoke the deliberate judgment of the court thereon. Of course, the findings
1543 of both law and fact in the master's report should be taken as presumptively correct and should be followed unless an obvious error has occured in the application of law, or a serious and important mistake has been made in the consideration of proofs. (*Kimberly* v. *Arms*, 129 U. S. 512, 523; *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 279 Fed. 649; *Empire Rubber & Tire Co.* v. *De Laski & Thropp Co.*, 281 Fed. 1; *Continuous Glass Press Co.* v. *Schmertz Wire Glass Co.*, 219 Fed. 199, 205; *Marston* v. *Noble*, 157 Fed. 506.)

The master found that the total sales of doublemint throughout the accounting period amounted to $8,917,286.90; that the manufacturing cost thereof was $3,764,597.58, leaving as gross profits thereon $5,152,689.32.

From the amount of gross profits the master made deductions as follows:

Advertising	$996,127.45
Overhead expenses	915,506.09
Loss on sale of merchandise with doublemint	12,258.41
Loss by fire at Balize	1,700.30
Cost of printing United Profit Sharing Coupons	7,453.38
Amount paid for United Profit Sharing Coupons	332,946.71
Contingent liability for unredeemed United Profit Sharing Coupons	98,519.06

The master also charged Wrigley Company with $71,905.74 for doublemint's share of interest and dividends received on bank balances, loans and investments. The master disallowed Wrigley Company's claim for deductions as follows:

Interest on capital invested in tangible assets	$304,489.89
Interest on capital invested in patents and patent rights	52,804.27
Interest on good will	290,454.91
Depreciation of patents and patent rights	64,267.43
Federal income and excess profits taxes	621,108.97

In passing upon these exceptions it becomes necessary to determine the general rule by which the accounting of profits is to be governed.

It must be borne in mind that the Circuit Court of
1544 Appeals has made no award in this case. It did not undertake to prescribe the final decree which is to be entered. On the contrary, it is declared that no question arising out of the accounting "is reviewable in this court until after the District Court shall finally have passed on the master's report." The Circuit Court of Appeals did decide certain questions involved in this case, and this Court, in entering the final decree, must give effect to that decision. The Circuit Court of Appeals has laid down as the law of this case that "the two articles are one and the same in the eyes of the trade," and that Wrigley Company had constituted itself "the agent of Larson Company in making and selling the common package." No special rule was prescribed in this case for making deductions from the gross amount of the sales in determining the amount of profits which Wrigley Company, as the self-constituted agent of Larson Company, is to be required to turn over to Larson Company.

Counsel for Larson Company assert that all exceptions on the ground of the failure of the master to make deductions for expenses or on the ground of the inadequacy of the deductions allowed by him must be overruled for the reason that Larson Company is entitled to a decree for the entire gross profits They assert that while no exceptions have been taken by them to the master's report on the accounting, it is their intention to attack in the reviewing courts the interlocutory decree because it authorizes the deductions for overhead, advertising and other expenses. Wrigley Company, they claim, was a wanton, malicious trespasser, and is subject to a different rule when required to account for profits as a trustee ex maleficio than the one which is applicable to a trustee ex maleficio who is an accidental or careless trespasser, they in-
voke the rule as to the measure of damages for the wilful
1545 conversion of property. It is stated in *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 293, referring to *Woodenware Co.* v. *United States* 106 U. S. 432, as follows:

"It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized."

They also invoke the rule that one to whom a fraudulent conveyance has been made cannot be reimbursed as against creditors of the grantor for his repairs or improvements or encumbrances lifted by him whilst in his possession. (*Railroad Company* v. *Soutter,* 13, Wall. 517, 523; *Burt* v. *Gotzian Co.,* 102 Fed. 937.)

The interlocutory decree here was entered at the instances of Larson Company. The Court of Appeals said in its second opinion:

"But Larson was actor, was in control of its own side of the litigation and neither Wrigley Company nor the master nor the District Court in view of the decree as entered, could properly compel it to litigate 'undermining of its trade'—a matter that it had waived in this court by its briefs; and in the District Court by its tender of form of decree."

If the position of Larson Company is correct the long accounting proceeding was unnecessary. There was no controversy as to the amount of the gross sales and manufacturing cost. No application was made to modify the interlocutory decree. It cannot be that under the rules of equity procedure Larson Company having adopted the basis for relief set out in the form of interlocutory decree which it tendered and having obtained an accounting on that basis, will be heard to say that it is entitled to have its recovery determined upon different principles and measured by a different standard. It must be borne in mind that this is an equitable proceeding in which the Court, having obtained jurisdiction upon the claim of right to an injunction retains it for the pur-
1546 pose of administering complete relief. In such a proceeding the recovery must be compensatory and not punitive in this Court, unless there is a statute which expressly authorizes the allowance of punitive damages. In *United States* v. *Bernard, et al.,* 202 Fed. 728, 732, Judge Gilbert, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"In action of trespass where the injury is wanton or malicious, or gross and outrageous, or is done against the protest of the plaintiff or in known violation of the law, the court may permit the jury to add to the measured compensation of the plaintiff further damages by way of punishment or example, the amount thereof to be left to the jury's discretion, in view of the special, peculiar circumstances of the case. But the function of a court of equity goes no further than to award as

incidental to the other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages. By applying to a court of equity for relief, the complainant waives all claim to vindictive damages."

In *Hamilton Shoe Co.*, v. *Wolf Bros. Co.*, 240 U. S. 251, 259, the Supreme Court in a case in which the infringement was wilful and deliberate, said:

"The infringer is required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the cestui que trust. Not that equity assumes jurisdiction upon the ground that a trust exists. As pointed out in *Root* v. *Railway*, 105 U. S. 189, 214, and *Tilghman* v. *Proctor*, 125 U. S. 136, 148 (patent cases), the jurisdiction must be rested upon some other equitable ground—in ordinary cases, as in the present, the right to an injunction—but the court of equity, having acquired jurisdiction upon such a ground retains it for the purpose of administering complete relief, rather than send the injured party to a court of law for his damages. And profits are then allowed as an equitable measure of compensation, on the theory of a trust ex maleficio."

(See also *Computing Scale Co.* v. *Toledo Computing Scale Co., supra.*)

In *Christianson, et al.* v. *National Brake & Electric Co.*, decided August 14, 1924, District Judge Geiger said:

It is my understanding that the popular characterization of an infringer as a trustee ex maleficio is referable properly to the origin of his liability, that is, his situation is analogous to that of a trustee, but arising through his wrong. He is viewed as one who has profited through wrongful appropriation
1547 of a right and is therefore called upon to account upon the principles applicable to one against whom the liability to account is initially contractually or by other express act or assent, created. It was not and is not intended, however adequate the popular characterization of the situation may appear, that the principles of stating the account should be novel, or that they should be applied to produce purely punitive results. The law, after all, aims to cast the infringers profits as profits are cast. Therefore, in respect of interest, the view has obtained that although capital was used to exploit a right appropriated without leave of the patentee, it was still the infringers capital, interest whereon is allowable, and, quite regardless of whether the infringers actually paid

it as upon borrowing. * * * The doctrine of account as upon a trust certainly can not be introduced merely to punish the wrong doer by treating as gains actual disbursements which had the trust been lawfully created, would be recognized."

No reason is perceived why the general equitable principles above stated are not applicable in cases of unfair competition as well as in suits for the infringements of patents or trademarks. The rules applicable to assessing damages at law in cases of wilful conversion or in determining the rights of a fraudulent grantee who has improved the property which has come into his possession do not apply in determining profits which are to be allowed in a decree in an equity suit as an equitable measure of compensation.

The interlocutory decree directed the master to take account of all gains and profits of Wrigley Company accuring or arising from the manufacture and sale of its doublemint gum in the enjoined dress; and he was directed in ascertaining such profits to make proportionate deductions for overhead, advertising and other proper expenses. The mandates of the Circuit Court of Appeals make no award of profits. The interlocutory decree makes no such award. The accounting has been had and it is now the duty of the court to enter a decree in which, in view of the question decided by the Circuit Court of Appeals, profits are allowed as an equitable measure of compensation. The deductions for expenses to be made from the gross profits may now be considered separately.

1548 Interest on Capital in *Globe Wernicke Co.* v. *Safe-Cabinet Co., supra* an unfair competition case in which the imitation was found to be deliberate and wilful and with intent to deceive, the Court said:

"Should the defendant have been credited with interest upon the portion of its capital employed in the branch of its business devoted to the production of the sales in question. * * * Concedely, if the capital employed in the manufacture of these products has been borrowed the interest upon indebtedness would necessarily be regarded as an item of expense and consequently considered in determining the net profits of the business. The only objection of any force to the allowance of such an item of deduction is that the defendant is thereby permitted a profit from the transaction; but it seems clear that the results are the same whether the defendant applies to such production money which it would have otherwise invested elsewhere, or goes to a bank and borrows

money for the same purpose for net profits can be ascertained only by deducting the cost of operation one item of which is interest on the capital actually invested and employed in such production. The profits to be accounted for in such case are not those which might reasonably have been made, but those which were actually realized from the sale of the infringed article. The wrongdoer is not permitted to profit from his own wrong, but actual cost and expense of production and sale should be considered in rendering such account. In determining such profits, interest on capital invested in a business, to the extent of actual employment in the infringing operations, along with other items of expense of production and sale, should be deducted from the gross amount received for such product.

In *Computing Scale Co.* v. *Toledo Computing Scale Co., supra,* it was said:

"Interest on investment is really the use of defendant's manufacturing plant and selling facilities in making and selling cylinder scales. * * * That such an allowance is a just credit against gross profits, see *Western Glass Co.* v. *Schmertz Wire Glass Co.*, 226 Fed. 730, (7th C. C. A.) and *Ochring v. Fox Typewriter Co.*, 251 Fed. 587, (2nd C. C. A.)"

In *Western Glass Co.* v. *Schmertz Wire Glass Co., supra,* it was said:

"The infringer is entitled to deduction from the profits for use of its capital (including plant) invested i nthe business, to the extent of its actual employment in the infringing operations, and that for such allowance interest may be computed upon the value thereof and apportioned for the share of infringing business wherever non-infringing business is carried on therewith and the share of each is ascertainable."

Interest on the amount of capital invested in the business of Wrigley Company to the extent of its actual employment
1549 in the manufacturing and marketing of doublemint gum is a proper deduction for expenses in this accounting. There is nothing in the law of the case as laid down in the Circuit Court of Appeals which forbids it. The interlocutory decree directs the deduction of all proper expenses and under the decisions above cited interest on capital is a proper expense where the plaintiff elects to take the profits of the infringer or imitator as the equitable measure of his compensation.

The evidence returned by the master furnishes a sufficient basis upon which to determine that part of the capital of

Wrigley Company which consisted of tangible assets employed in the manufacturing and marketing of doublemint. This clearly appears from an examination, of the testimony and an inspection of the exhibits returned with the report.

It is unnecessary to review these tables in detail here. There is no material conflict in the evidence. The rate at which interest should be computed on invested capital is hereby fixed at six per cent. During a portion of the accounting period the current rate for interest on loans was more than six per cent. Considering the period as a whole and bearing in mind that the trusteeship arose not by contract but by operation of law, and that Wrigley Company was the aggressor, six per cent is, under all the circumstances in this case, a reasonable rate. A deduction of $259,120.54 should be made for interest on capital invested in tangible assets.

There is no valid reason why interest on capital invested in patents and patent right should not be allowed. It was necessary to use machinery to manufacture the gum, and the patents and patent rights were essential in providing machinery. They were just a part of the capital devoted to the operations in doublemint as were the physical machines and the buildings themselves. The evidence as to the proper de-
1550 duction from gross profits on this account is clear and involves no material conflict, taking six per cent as the proper rate of interest a deduction of $45,260.79 should be made for interest on capital invested in patents and patent rights.

It is true that the good will of a business, while it is sometimes referred to as an intangible asset, is just as real as physical property. In placing a fair value upon the investment in a business the plant must be considered as a going concern. There is an element of value in an assembled and established plant doing business and earning money over one not thus advanced.

The difficulty here, however, is in determining what part, if any, of the invested capital of Wrigley Company represented by good will was employed in the production and making of doublemint gum. Much of this good will was the result of large sums expended in advertising the products of Wrigley Company and in building up a market for them. We must give effect to the command of the Circuit Court of Appeals that this case is to proceed upon the basis that the eyes of the trade doublemint and wintermint were the same Doublemint must be viewed, not as a product of Wrigley Company, but as

Larson Company's product. The creation of the stipulation in the pleadings and in the adjudication on the appeal must obliterate the impression of the eye.

The selling organization built up by Wrigley Company and the market created by its advertisement were, without doubt, effective to some extent in promoting the sales of its imitation of Larson Company's product, but, of course, they were not effective to the same degree as in marketing the products of Wrigley Company. The extent to which they were effective is speculative. No basis exists in view of the finding of the Circuit Court of Appeals as to the identity of the packages for making an apportionment and interest on good will must be disallowed.

1551 Depreciation of patents and patent rights. Wrigley Company claims a deduction of $64,267.43 on this account. In its claim for interest on investment in patents, Wrigley Company charged off for depreciation at the rate of 1/17th annually. This was pursuant to a rule of the Treasury Department. Such a rule, however, cannot take the place of evidence of real depreciation. A patent which has a short time to run is frequently more valuable than it was when it was issued. The evidence in support of this claim is insufficient and the exceptions relating to it will be overruled.

Deductions for overhead expenses. The exceptions on this point cover the refusal of the master to make certain allowance aggregating $54,163.26.

Some of those items should have been allowed. They are as follows:

Depreciation on buildings	$2,617.52
Tax on essential oils	49.17
Salaries and expenses, Brooklyn and Toronto	560.03

It is clear that the inclusion of these items in manufacturing costs by Wrigley Company in its filed account, and the acceptance of the statement by Larson Company with the items included was due to a mutual mistake of fact. This is a court of equity and the deductions should be made.

The other items involve questions of fact upon which the holding of the master will not be disturbed. As to the claim for Brooklyn moving expenses, it may be said that it appears to be based solely on book entries. It is a claim for damages against the United States in the process of adjustment. The evidence is not sufficient to justify its allowance.

As to the claim for re-apportionment for overhead for 1918, this involves an accounting question. The master adhered to
the apportionment made on the basis of ledger figures
1552 and refused to accept the revised statement, based upon
ratio of sales. Any determination of the overhead for a portion of a year is necessarily an approximation only, and the method pursued by the master leads to results which in all probability are as near the real truth as the ones which it is urged should be adopted in its place.

The claim on account of payment of notes to Pulver during the accounting period was properly rejected. The purchase was in 1913. It may have eliminated some competition and added to the good will of Wrigley Company. The payments cannot be said to be a part of the overhead expenses of marketing doublemint which in the eyes of the trade was Larson Company's product. The reasons given for disallowing interest on good will are applicable to this item.

As to the other items relative to overhead an examination of the record discloses no reason for sustaining the exceptions.

Contingent liability for unredeemed United Profit Sharing Coupons. There is no substantial dispute in the evidence on this point. In the nature of things, exact conclusions cannot be drawn from it. The problem, however, is not more difficult than are many problems with which the courts have to deal. Many times a rule formulated from past experience must be applied to a present situation. The use of mortuary tables is an illustration. In determining the per cent of these coupons issued in connection with the sales of doublemint which will be redeemed, consideration must be given to the experience of other concerns issuing coupons under trade conditions similar to those in this case. The action of the Federal Government in the administration of the Federal Tax Laws in permitting the establishment of a reserve of sixty per cent must be given some weight. The truth is ob-
viously between the extreme contentions of the parties.
1553 The court should proceed with caution in modifying the
conclusion of the master on a point like this, but, if it is convinced that due consideration has not been given to all elements the conscientious performances of judicial duty requires that the modification should be made. I am convinced that the per cent fixed by the master is inadequate and that there should be an addition of at least five per cent to the master's percentage of 33⅓ pe rcent. This makes an addi-

tional allowance of $64,715.60 to which Wrigley Company is entitled.

Advertising. The interlocutory decree directed the ascertainment of profits accruing from the sale of doublemint as contradistinguished from other brands of gum made by Wrigley Company during the accounting period making proportionate deductions for overhead, advertising, and other proper expenses. The term proportion means the portion which falls to one's lot when the whole is distributed according to a rule or principle. The interlocutory decree does not determine the rule or principle by which the expense for advermine the rule or principle by which the expense for advertising is to be apportioned. Obviously, the correct rule is to determine the part of the total amount expended for advertising which was spent by Wrigley Company as the agent for Larson Company in advertising a product which was held by the Circuit Court of Appeals to be Larson Company's product in the eyes of the trade. Here again it is the creation of the stipulation in the pleadings and the mandate of the reviewing court and not the impression through the eye which must control. The identity of package required the allowance of all profits to Larson Company and in determining the amount of those profits Wrigley Company is entitled to whatever benefits may result from the fact that as Larson Company's agent it was advertising and selling a package identical with that of Larson Company. Whatever amounts were ex-
pended in good faith in advertising Larson Com-
1554 pany's packages are proper deductions here. In view
of the equitable principles which must control the determination of profits here, the ground upon which Larson Company has been given all of the profits cannot be shifted when it comes to fixing the profits so as to prevent the allowance of proper expenses for marketing what in the eyes of the trade was Larson Company's package.

The master has found that part of the advertising was general or institutional in character. This was obviously correct. As a result of long and patient examination he has determined the amount of such institutional advertising. In determining the part of such general advertising which should be charged against doublemint we meet with difficulties analogous to those presented by the claim for interest on good will. The difficulty is in determining how much this advertisement of the Wrigley concern contributed to the marketing of a product which in the eyes of the trade was Larson Com-

pany's product. Doubtless it added to Wrigley Company's efficiency to serve as the selling agent for Larson Company's product, but there is a difference between the value of the good will in selling the products of Wrigley Company and that value in selling, as agent, the products of another. By a process of amortization the master determined the part of this institutional advertising chargeable against doublemint on the basis of the ratio of sale of doublemint to total sales. Larson Company did not except to this determination. There is no basis in this record for any other finding on this subject and the master's report in this respect will be approved. The amount chargeable to doublemint on account of such institutional advertising is $205,079.78.

When we come to distribute the expense of advertising other than that of a general or institutional character
1555 we must give effect to the identity, found by the Circuit Court of Appeals, upon the pleadings, between the packages of Wrigley Company's doublemint and Larson Company's wintermint, Wrigley Company was advertising Larson Company's package and expenditures for that purpose if made in good faith, are proper charges against doublemint. There is no more reason for relieving doublemint from expenses incurred in good faith in advertising that brand than there would be for charging it with expenses for advertising if, in fact, it had not been advertised at all. The record furnishes a basis for determining the amounts expended in good faith in advertising doublemint after the deductions are made for the general or institutional advertising.

The proper charge against doublemint for the actual quantity of space in newspapers and magazines, in street car cards, in bill posting, on walls, bulletins and electric signs and in Mother Goose booklets at $1,217,640.50. The accountants have agreed upon this figure, if compilations of the witness Stanley are taken as correct; and a careful examination of this record satisfies met that the tabulations on this subject are free from error which will materially affect this result.

In addition to this, doublemint should be charged with the expenses of the doublemint sample campaign, amounting to $308,219.51. The master's allowance of $72,981.24 of salaries and detail men is approved. Larson Company has not questioned it by exception and the record discloses no definite basis for any other apportionment. The allowance of $92,-797.21 for doublemint's portion of cost of redemption of war tax rebate certificates is likewise approved.

There remains the item in the master's report in which an allowance is made for doublemint's portion of advertising containing no institutional features. This was determined on a sales basis. Doublemint should be charged,
1556 in my opinion, with the actual amount expended in good faith in advertising it. The items in question embraces advertising material, miscellaneous advertising and donations of gum.

The "Mother Goose booklets" are a part of the "advertising material". Allowance has been made for them already and they have been eliminated from the items now under consideration. The allowance for items now under consideration, which should be made on the basis above stated, is $156,816.73.

The total deduction to be made for expense of advertising is $2,053,534.97.

The Federal income and excess profits taxes. Wrigley Company claims to be entitled to deduct from its profits on doublemint the amount paid for excess and income taxes upon those profits. The amount claimed in the filed account is $563,933.89. Their accountants present a figure of $621,-108.97. A revised figure of $372,942.09 which it is claimed is upon the basis approved in *Prangborn* v. *Sly*, 276 Fed., 971, is submitted. None of these figures take into consideration the fact that Larson Company will be required to pay a federal tax upon the profits recovered in this proceeding.

Without stopping to point out essential differences between *Prangborn* v. *Sly*, *supra*, and this case, it is sufficient to say that there are controlling reasons why the claim for this deduction cannot be entertained in this equitable proceeding. The rule with reference to taxes on property used in the production and marketing of an infringing product do not appear to be applicable here. Wrigley Company adjusted the tax on its income and profits with the Government. In that adjustment it returned the profits on doublemint as its profits. It retained those profits and has received the
1557 benefit of their use. Larson Company has elected to take an accounting of profits as the equitable measure of compensation for the acts of Wrigley Company. Those profits are to be treated as unliquidated under equitable principles until the statement of the account has been made and filed by the master. It is equitable that under these circumstances Wrigley Company shall be left in the position in which it has placed itself by its own act in reporting the profits on

doublemint as its profits and in settling with the United States on that basis.

The charges against Wrigley Company for a proportion of the income arising out of the investment of Wrigley Company's profits. The master added to the profits for which Wrigley Company is held chargeable an item of $71,905.74, which it is said in the report represents doublemint's share of income arising from the investment of profits whether considered as invested in the gum business or otherwise. The total miscellaneous income is allocated in the proportions that the accumulated profits of doublemint at the first of each calendar year bear to the total invested capital excluding intangibles, accumulated doublemint profits being considered as doublemint's investment in the business. Interest on invested capital has been allowed; and under the Seventeenth exception an addition of $26,202.73 is proper. An application of the principles under which an allowance for federal taxes has been refused precludes any further addition upon the theory stated by the master. The principles applied in the case should not be shifted so as to treat the profits as liquidated for one purpose and unliquidated for another purpose.

Interest on award. The master recommends the allowance of interest from the end of the accounting period. This case is controlled by the general principles of equity. No 1558 special statute for increasing the award, as in patent cases, is applicable. *B. F. Goodrich Co.* v. *Consolidated Rubber Tire Co. et al.* 251 Fed. 617 and *Malleable Iron Range Co.* v. *Lee*, 263 Fed. 896, and kindred cases are not in point. The decree in those cases was for damages upon the basis of a reasonable royalty. In the case first mentioned the Court, said:

"We see no valid reason for withholding interest where the damages are based upon a reasonable royalty. In fact, precedent, and not the logic of the situation (*Tilghman* v. *Proctor*, 125 U. S. 136 is all that prevents the allowance of interest in case of damages based on the infringer's profits." And precedent must control here. Larson Company elected the basis of its recovery. When it waived damages and took a recovery of profits, it adopted likewise the equitable principles which control in such a proceeding. (*Tilghman* v. *Proctor, supra; Railway Co.* v. *Root*, 105 U. S. 189, 198, 200, 204; *Littlefield* v. *Perry*, 21 Wall. 205, 229; *Mowry* v. *Whitney*, 14 Wall. 620, 651; *Silsby, et al.* v. *Foote*, 20 How 378, 386; *Toledo Scale Co.* v. *Computing Scale Co.*, 281 Fed. 488; *West-*

ern Glass Co. v. *Schmertz Wire Glass Co.*, 226 Fed. 730; *Munising Paper Co.* v. *American Sulphite Pulp Co.*, 228 Fed. 700; *McCourt* v. *Singers-Bigger*, 145 Fed. 103.) It would be not only illogical but inequitable to charge Wrigley Company with interest from the end of the accounting period and at the same time refuse to treat the assessment of profits as liquidated in determining the claim for Federal taxes. Interest will be allowed on this award at the rate of six per cent per annum from the date of the filing of the master's report.

Compensation of accountants. The fees of James Hall, accountant, should be taxed as costs in this case. The fees of Touche, Niven & Co. are not allowed as costs.

1559 The master's recommendation as to the taxation of compensation of the master's office is approved and costs will be taxed accordingly.

The Canadian Corporation. In January, 1916, "Wm. Wrigley, Jr. Company, Limited" was organized under the laws of Canada; and the property and business of the West Virginia corporation, plaintiff and cross-defendant herein, in Canada was transferred to the Canadian corporation under a contract which is in evidence in this case. The common stock of the Canadian corporation was distributed among the stockholders of the West Virginia corporation. The Canadian corporation, from the time of its organization, was controlled by its own board of directors elected by its own stockholders.

The master has ruled that the West Virginia corporation shall be required to account for the profits of the Canadian corporation on doublemint in the infringing dress. While the proceedings as to the business of the Canadian corporation were pending before the master, the report now under consideration was filed. The master reserved for further consideration the accounting as to the business of the Canadian corporation and states, in his report, that it is his intention to make a separate report, on that subject. The Wrigley Company objects to this division of the case and insists that but one final decree shall be entered. It contends that the question of the responsibility of the defendant corporation for the acts of the Canadian corporation and its liability to account for the profits of that corporation was not submitted to the master under the order of reference. It contends also that upon the undisputed evidence in the record before the master which has been reported to the court, the relation between the two corporations did not make the West

Virginia corporation liable for the profits of the Ca-
1560 nadian corporation, and that Larson Company's remedy for alleged unfair competition by the Canadian corporation is in a suit against that corporation.

The order reference directed the master to take an account of all the gains and profits of William Wrigley Jr., Company to it accruing or arising from the manufacture and sale of its doublemint gum in the enjoined dress. The master did not have authority, under this order, to include the profits of the Canadian corporation, unless the business carried on in the name of that corporation was essentially a branch or division of the business of the West Virginia corporation. And, in view of the fact that the corporations were two distinct legal entities, it is questionable whether, under the order of reference, the master was empowered to try out the issues of the relationship of the one corporation to the other. It is very plausibly contended that if the business of the Canadian corporation is to be brought into this case, that issue should be tried in the first instance by the Court upon appropriate pleadings. The master upon an order for an accounting by the West Virginia corporation of its profits has undertaken to pass upon the liability of the West Virginia corporation for the acts of another separate and distinct corporate entity.

Was the business of the Canadian corporation a branch or division of the business of the West Virginia corporation in the sense that the profits of the first may be said to constitute a part of the profits of the second? In answering this question, we must not lose sight of the principle upon which a recovery of profits is allowed in cases like this. The ground of recovery is that they are the benefits which have accrued from the wrongful acts of the defendant, and for which the defendant is liable, ex aequo et bono, to the like extent as a trustee would be who had used the trust property for his own advantage. The defendant is, therefore, liable to ac-
1561 count for such profits only as have accrued to itself from its wrongful acts, and not for those which have accrued to another, and in which it has no participation, (*Belknap* v. *Schild*, 161 U. S. 10, 25; *Hamilton Shoe Co.* v. *Wolf Bros. supra*, p. 259).

The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises a control over the other through the ownership of its stock, or through identity of its stockholders does not make either the agent of the other, nor does it merge them into a single legal entity,

so that the acts of the one are to be treated as the acts of the other. (*Pullman Car Co.* v. *Missouri Pacific Co.* 115 U. S. 587, 597; *Pittsburg and Buffalo Co.* v. *Duncan,* 232 Fed. 584, 587.)

The application of the principles just stated it further illustrated in *Kessinger-Iron Co.* v. *Bradford Belting Co.* 123 Fed. 91; *Prest-o-lite Co.* v. *Bournonville et ux.,* 260 Fed. 446, and *Davey Tree Expert Co.* v. *Frost and Bartlett Co.* 300 Fed. 680. True, the legal fiction of district corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted "as to make it only an adjunct or instrumentality of another corporation." There is no evidence of fraud in connection with the organization and operation of the Canadian corporation. Under the undisputed facts there is no reason why the two corporations should not be regarded for the purpose of this litigation as distinct legal entities.

The master's ruling in directing the West Virginia corporation to account in this proceeding for the profits of the Canadian corporation was, in my opinion, erroneous. This makes it unnecessary to consider other questions which have been argued with reference to the entry of the decree.

The master's report, except as to the points above indi-
1562 dictated, namely those covered by exceptions 11, 14a, 15, 17, 19, 26, 27b, 27 and 28 is approved. A decree will be entered for $1,384,649.12 with interest from the date of the filing of the master's report and costs to be taxed against Wrigley Company.

JAMES H. WILKERSON,
United States District Judge.

1563 those covered by exceptions 11, 14a, 15, 19, 26, 27b and 23 is approved. A decree will be entered for $1,384,649.48, with interest from the date of the filing of the master's report and costs to be taxed against the defendant.

JAMES H. WILKERSON,
United States District Judge.

(Endorsed) Filed Mar. 14, 1925. Charles M. Bates, Clerk.

Entered Mar. 20, 1925.

1564 And afterwards on, to wit, the 20th day of March, 1925, this matter coming on to be heard, the following Decree was entered by the Court, also Order allowing Appeal in words and figures following to wit:

1565 • • • 488 • • •

DECREE.

This cause came on to be heard upon the exceptions taken by the Wm. Wrigley Jr. Company to the report filed on November 13, 1923, herein by the Master in Chancery, Charles B. Morrison, to whom said cause was referred, and was argued by counsel for the respective parties, and then upon consideration thereof it was Ordered, Adjudged and Decreed as follows, viz.:

That exceptions 11, 14, (a), 15, 17, 19, 26, 27 (b) and 27 (f) are, and each of them is, hereby allowed in the manner and to the extent indicated in the written opinion filed herein by this Court on March 14th, 1925, and exception 28 is hereby allowed, and all other exceptions filed by the said Wm. Wrigley Jr. Company to said report are hereby overruled.

It is therefore, Ordered, Adjudged and Decreed that the said L. P. Larson Jr. Company do have and recover from the said Wm. Wrigley Jr. Company the sum of One Million Three Hundred and Eighty-four Thousand, Six Hundred and Forty-nine Dollars and Forty-eight Cents ($1,384,649.48), with interest thereon from the date of the filing of the said Master's report herein, to wit: November 13, 1923, at the rate of six per cent (6%) per annum from said date to the date of
1566 payment or satisfaction of this decree, together with costs to be taxed, and the said Wm. Wrigley Jr. Company now here in open court duly objects and excepts to each and every part of the foregoing decree except insofar as it sustains exceptions of said Wm. Wrigley Jr. Company.

Entered March 20th, 1925.

(Signed) JAMES H. WILKERSON,
Judge.

1567 And on to wit: the 20th day of March, A. D. 1925, there was filed in the Clerk's office of said court a certain Petition in words and figures following to wit: Filed Mar. 20, 1925.

1568 • • • 488 • • •

PETITION FOR APPEAL.

To the Honorable James H. Wilkerson, Judge of said District Court:

The above named plaintiff, Wm. Wrigley Jr. Company, feeling itself aggrieved by the decree of this court made and entered herein on the 20th day of March, 1925, in the above entitled cause, adjudging that said plaintiff recover from said defendant $1,384,649.48 with interest and costs, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors filed herewith.

Wherefore, said Wm. Wrigley Jr. Company prays that its said appeal be allowed and that a citation be issued as provided by law, directed to the above named defendant, L. P. Larson Jr. Company, commanding it to appear before the said United States Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises, and that a transcript of the proofs, exhibits, evidence,
1569 record and all proceedings in the case and upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, under the rules of such court in such case made and provided. And your petitioner further prays that the proper order relating to the required security to be required of it be made and that execution of said decree be stayed herein and that said appeal may operate as a supersedeas.

WM. WRIGLEY JR. COMPANY,
By ISAAC H. MAYER,
WALLACE R. LANE,
Its Solicitors.

Filed March 20, 1925. Charles M. Bates, Clerk.

Filed Mar. 20, 1925.

1573 And on to wit: the 20th day of March, A. D. 1925, there was filed in the Clerk's office of said court a certain Assignment of Errors, in words and figures following to wit:

1574 • • • 488 • • •

ASSIGNMENT OF ERRORS.

Now comes said plaintiff and defendant to counterclaim in the above entitled cause, Wm. Wrigley Jr. Company, by Isaac H. Mayer and Wallace R. Lane, its solicitors, and presents and files this its assignment of errors on which it will rely upon its prosecution of its appeal in said cause from the decree entered by said court in said cause on the 20th day of March, 1925, and says that in the record and proceedings and also in the said decree there are manifest errors as follows:

1. The said District Court erred in holding that the Circuit Court of Appeals has decided in this case, as the law of the case, that the plaintiff, the Wm. Wrigley Jr. Company, was not entitled to show that the profits, if any, on its sales of Doublemint gum in the enjoined dress were not due to the use of the enjoined dress but were due to other causes.

2. The said District Court erred in holding that the plaintiff was not entitled to show that the profits, if any, on its sales of Doublemint gum in the enjoined dress were not due to the use of the enjoined dress, but were due to other causes.

1575 3. The said District Court erred in not finding and holding that the burden was upon the defendant, the L. P. Larson Jr. Company, to prove that some gains or profits accrued to the plaintiff, the Wm. Wrigley Jr. Company, from the use of the enjoined dress in the sale of its Doublemint gum and that the defendant failed to make any such proof.

4. The said District Court erred in not finding and holding that the plaintiff made no gains or profits accruing or arising from the manufacture and sale of its Doublemint gum which were due to the enjoined dress.

5. The said District Court erred in not finding and holding that no gains or profits accrued to the plaintiff, Wm. Wrigley Jr. Company, or arose from the manufacture and sale of its Doublemint gum in the enjoined dress.

6. The said District Court erred in holding that the pleadings in this suit constitute a conclusive admission by the plaintiff that all its Doublemint gum sold in the enjoined dress during the accounting period was sold as and for the Wintermint gum of the defendant.

7. The said District Court erred in holding that the plaintiff is liable for profits accruing to it from the sale of Doublemint gum wrapped in counter-bands bearing the legend:

"Made by the Manufactures of the famous
Wrigley's Spearmint
Wm. Wrigley Jr. Company
Chicago New York
Toronto London"

8. The said District Court erred in not allowing plaintiff to deduct from its gross profits $2,872,844.43 on account of its advertising expenses.

1576 9. The said District Court erred in allowing plaintiff a deduction of only $2,053,534.97 on account of its advertising expenses.

10. The said District Court erred in finding and holding that more than $21,171.67 of the amount spent by plaintiff for advertising was for general or institutional advertising.

11. The said District Court erred in amortizing any portion of the amounts expended by plaintiff for advertising.

12. The said District Court erred in allocating more than $21,171.67 of plaintiff's advertising expenses, on the so-called sales basis.

13. The said District Court erred in not adopting plaintiff's method of determining the amount of deductible advertising expense, which was by measuring each advertisement separately and using the following method of allocation, namely—

(1) Where the advertisement specifies only Doublemint, charging the entire cost thereof to Doublemint; and

(2) Where the advertisement specifies Doublemint together with one or more other brands, charging each brand named therein with the cost of the exact space occupied by that brand in the advertisement, whether by a picture of the package, or by a logotype, or by any other matter referring to the specified brand, and charging among the brands named in the advertisement the balance of the cost in the proportion which such space bears to the total space occupied by all packages, logotypes, and any other matter referring to the specified brands.

14. The said District Court erred in not allowing plaintiff credit for $174,028.45 for Detail Men, and in allowing it credit for only $72,981.24 therefor.

1577 15. The said District Court erred in not allowing plaintiff credit for $99,939.51 on account of War Tax Rebate certificates, and in allowing it credit for only $92,797.21 therefor.

16. The said District Court erred in not allowing plaintiff credit for $33,107.48, or any sum whatever, on account of the Frank F. Pulver item.

17. The said District Court erred in not allowing plaintiff credit for $303.91, or any sum whatever, on account of cost of Alterations of Main Office.

18. The said District Court erred in not allowing plaintiff credit for $748.23, or any sum whatever, on account of cost of Plans for Factory Additions.

19. The said District Court erred in not allowing plaintiff credit for $2,240.18, or any sum whatever, on account of Advance to Chicle Growers.

20. The said District Court erred in not allowing plaintiff credit for $12,500.25, or any sum whatever, on account of Reapportionment of 1918 Overhead.

21. The said District Court erred in not allowing plaintiff credit for $28,392.93, or any sum whatever, on account of Brooklyn Moving Expenses.

22. The said District Court erred in not allowing plaintiff credit for $314,252.03 on account of its contingent liability for unredeemed United Profit Sharing Coupons, and in allowing it credit for only $163,234.66 therefor.

23. The said District Court erred in not allowing plaintiff credit for $969,669.35 on account of overhead expenses.

1578 24. The said District Court erred in not allowing plaintiff credit for $304,489.89 on account of interest on capital invested by plaintiff in tangible assets, and in allowing it only $259,120.54 therefor.

25. The said District Court erred in not allowing plaintiff $52,804.27 on account of interest on capital invested by it in Patents and Patent Rights, and in allowing it only $45,260.79 therefor.

26. The said District Court erred in not allowing plaintiff interest at the rate of 7 per cent instead of 6 per cent per annum on its capital invested in tangible assets and Patents and Patent Rights.

27. The said District Court erred in not allowing plaintiff $290,454.91, or any sum whatever, on account of interest on capital invested by it in Good Will.

28. The said District Court erred in not allowing plaintiff credit for $64,267.43, or any sum whatever, on account of depreciation of Patents and Patent Rights.

29. The said District Court erred in not allowing plaintiff credit for $621,108.97, or any sum whatever, on account of its Federal Income and Excess Profits taxes.

30. The said District Court erred in not allowing plaintiff credit for $28,740.38, or any sum whatever, on account of Advertising Subscriptions.

31. The said District Court erred in not allowing plaintiff credit for $403,693.36, or any sum whatever, on account of Manufacturer's Profits.

1579 32. The said District Court erred in finding and holding that plaintiff should pay interest on the amount awarded by the court against plaintiff and in favor of defendant from November 13, 1923, the date of the Master's report, and in not finding and holding the defendant is not entitled to recover interest on said award prior to the date of the entry of said final decree herein.

33. The said District Court erred in allowing interest at the rate of 6 per cent on its said award from November 13, 1923, the date of said Master's report.

34. The said District Court erred in decreeing that said plaintiff, Wm. Wrigley Jr. Company, pay to said defendant, L. P. Larson Jr. Company, the sum of $1,384,649.48 with 6 per cent interest thereon from November 13, 1923.

35. The said District Court erred in finding, holding and decreeing that the plaintiff pay any costs herein, and in not finding, holding and decreeing that the defendant pay all the costs herein.

36. The said District Court erred in finding and holding that it was impracticable and impossible to ascertain which of the sales of Doublemint gum in the enjoined dress were due to the use of the enjoined dress and which of such sales were due to other causes.

37. The said District Court erred in not finding and holding that the defendant did not come into court with clean hands and that it, therefore, was not entitled to recover any profits in this action.

1580 38. The said District Court erred in finding and holding that the master properly rejected and refused to

consider the following evidence offered by the plaintiff upon the said trial before the master and which, if received, would have shown that no sales of Doublemint gum or profits were induced by the enjoined dress, viz.:

(a) The testimony of Edward W. Eckerly (Vice President and General Manager of Wm. Wrigley Jr. Company continuously since its incorporation in 1911 and in charge of sales and distribution of Wrigley's products during all that time and connected with Wm. Wrigley Jr. & Company (the predecessor of Wm. Wrigley Jr. Company, the party to this suit) and familiar with its sales for about fifteen years prior to the incorporation of the Wm. Wrigley Jr. Company); that it was the general practice during the accounting period for retailers who sold Wrigley's Doublemint gum to display it on counters in open boxes so that the ultimate purchaser could plainly see the box, as well as the Doublemint gum packages contained therein, and that the labels on and in said boxes conspicuously bore the words "Wrigley's Doublemint" as shown in Wrigley Exhibits 97, 98 and 99, respectively, offered but rejected by the Master; that the witness prepared a list showing the first sales of Wrigley's Doublemint gum by states and by months during the year 1914; that said list, which was offered in evidence as Wrigley Exhibit 100 and excluded by the Master, showed first sales of Doublemint gum in July 1914 in one state and in August, 1914 in six states, and in September, 1914 in 40 states, including the District of Columbia, and in October, 1914 in two states; that the witness
1581 has prepared a statement showing the number of boxes of Wrigley's Doublemint gum accounted for before the Master and shipped in the year 1914, which shows the number of boxes shipped separately in each month of that year, beginning with August and the states in which such shipments were made; that said document was offered as Wrigley Exhibit 101, but refused in evidence; that said list shows shipments of Doublemint gum as follows:

In August, 1914, 4,685 boxes in 8 states;

In Sept., 1914, 426,032 boxes in 48 states, including the District of Columbia;

In October, 1914, 228,327 boxes in 49 states, including the District of Columbia;

In November, 1914, 188,598 boxes in 49 states, including the District of Columbia;

In December, 1914, 136,893 boxes in 49 states, including the District of Columbia;

making a total of 948,535 boxes; that all said sales were made in boxes containing labels similar to said Wrigley Exhibits 97, 98 and 99, respectively, (offered but not admitted) in which the words "Wrigley's Doublemint" was conspicuously printed; that the sales of Wrigley's Doublemint gum covered every city, town, village and hamlet in the United States during the accounting period; that for many years prior to 1911 Wm. Wrigley Jr. & Company (predecessor of the Wm. Wrigley Jr. Company, party to this suit), had used the names "Wrigley's" and "Wm. Wrigley Jr. & Co." in connection with the manufacturing, advertising and sale of its gum throughout the United States and in foreign countries and had conspicuously marked the wrappers around each package with the name "Wrigley's" or "Wm. Wrigley Jr. & Co.", or both; that Wm. Wrigley Jr. Company (the party hereto) has manufactured chewing gum of various brands and sold the same since January, 1911 on an extensive scale in every state, city, town and village of the United States and in

1582 numerous foreign countries, and always used in connection therewith (except on private brands) the name "Wrigley's" or Wm. Wrigley Jr. Co.", or both, conspicuously on the counter-band wrapper of each five-stick package and on all the boxes, and has always used the name "Wrigley's" conspicuously in connection with the advertising of all its brands of chewing gum, including Wrigley's Doublemint gum; that each package containing five sticks of gum was plainly and conspicuously marked with the name "Wrigley's" and the name "Doublemint"; that the witness never knew or heard of any confusion of plaintiff's Doublemint gum with defendant's Wintermint gum or of anyone selling or attempting to sell Wrigley's Doublemint gum as Larson's Wintermint gum or as the product of the L. P. Larson Jr. Company; that the Wm. Wrigley Jr. Company wrapped its Doublemint gum in the way it did so as to associate its new product,—Doublemint—in the minds of the purchasing public with its Spearmint and other brands of gum previously manufactured and sold by it.

(b) The testimony of Dan Williams that he is Manager of the Sundries Merchandise Department of the United Cigar Stores Company and the buyer for that company, and that it distributes its merchandise to its retail stores and to various other retail stores handling its products; that he has been with that Company for 18 years; that he covers the entire middle west consisting of 17 states and did so during the ac-

counting period, and that during said time he purchased the articles dealt in by the company's various retail stores; that said Company had approximately 240 retail stores in said territory during the entire accounting period, and that witness had a list, ready to produce, of the location of
1583 those stores; that during the accounting period he furnished those stores various brands of Wrigley's gum including Doublemint gum; that he knows the persons who sell these gum products over the counters of the retail stores, as it was his duty to visit each of those stores once a year during the accounting period, and, while making such visits, to see that the stock was always adequate and that the stores had the character of gums and other products that the public demanded, and that he instructed the clerks in those various stores as to the manner of selling, and that during the entire accounting period, he observed the manner in which purchasers of gum sold by those retail stores inquired for and purchased the same; and that he knows from personal experience, observation and talking with various customers in those various stores and elsewhere that such customers many times do not live in the place where the store is located but are transients and go to these United Cigar Stores and other retail stores handling the gum product referred to because of their familiarity with those stores and agencies in other localities; that he is familiar with the demands made by each of those stores and customers purchasing goods therefrom for the products which they distributed during the accounting period; that in September, 1914 the United Cigar Stores Company began to order for distribution to its various retail stores Wrigley's Doublemint gum and that prior thereto the United Cigar Stores had extensively sold Wrigley's Spearmint and Wrigley's other brands; that he is familiar with the proportion of sales of Doublemint gum to the sales of all of Wrigley's gum during the accounting period by retailers and retail stores of the United Cigar Stores Company, whose gums are supplied them by that company, and that Dou-
1584 blemint's proportion of such sales to all sales of Wrigley's gum was 25% during the accounting period; that the United Cigar Stores Company bought $937,140.65 worth of Wrigley's gum during the accounting period for sale in its retail stores to the ultimate consumer, and of that amount $421,134.04 was bought by the United Cigar Stores Company through the witness for distribution in the 17 states in which he operated as buyer; that during his visits to the 240 stores

during the accounting period, he observed the manner in which the clerks therein handled the sales of Wrigley's gum; that he was in the store for a considerable period of time on each visit and that customers for gum, coming into those stores, on all occasions when he was present invariably asked for "Wrigley's gum", "Wrigley's Doublemint gum", "Wrigley's Spearmint gum," or "Doublemint gum", or "Spearmint gum", or whatever brand they desired, and they received the gum thus asked for, and whenever they desired Wrigley's Doublemint gum, they called for it as "Wrigley's gum", Wrigley's Doublemint gum" or "Doublemint gum", and under no other name, and that when the customer asked for "Wrigley's gum" the clerk would ask the purchaser what flavor or brand was desired and the customer would indicate his desire and would be supplied with the brand called for; that from his constant observation of the purchases of Doublemint gum and the sales thereof by clerks over the counter during the entire accounting period, he knows that the reason why they bought Doublemint gum was because they desired the product of the Wrigley Company and the reason why the United Cigar Stores Company sold Doublemint gum and other products of the Wrigley Company, as distinguished
1585 from other gums, which it did not handle, was because of the public demand for the products of the Wrigley Company; that although he knows of the requests of the consuming public and their demands and was familiar therewith during the entire accounting period, he knows of no sales of Wrigley's Doublemint gum that were made because it was wrapped in a green wax wrapper, and, so far as he knows, no one ever bought Doublemint gum as the product of any one other than the Wrigley Company, and that he would be extremely likely to know if any such purchase was ever made; that there was no demand for Larson's Wintermint gum at any of the retail stores of the United Cigar Stores Company or other dealers purchasing from that company during the accounting period, and that neither Larson's Wintermint gum or any other product of the Larson Company was on sale at any of those places during that time; that the United Cigar Stores Company never had any inquiries from any of its retail stores or agencies or customers for that company to supply Larson's gum, and the witness would likely have known if there were any such demand as he was watching the situation closely, as the United States Stores Company desires to sell whatever product there is a real demand for.

(c) The testimony of N. V. Hackanson that he has been with the United Cigar Stores Company for eighteen years, including the accounting period, and was District Sales Manager and Assistant to Dan Williams and had to do largely with concerns outside of the City of Chicago located in Illinois, Michigan, Iowa, Wisconsin and Indiana and that his principal duties during the accounting period were to visit the stores of that company and spend two or three days in each store and help the clerks operate them, to sell merchandise and in-
1586 crease the efficiency of the stores, and that there never was any request for Larson's Wintermint gum at any of those stores, and that customers calling for Wrigley's Doublemint gum would refer to it either under the name of "Doublemint", or "Wrigley's Doublemint", and that no effort was made to palm off Doublemint for Wintermint gum. And plaintiff also offered to prove by this witness facts similar to those contained in the offer of proof by Mr. Williams.

(d) The testimony of George B. Chapman that he has been with the Wrigley Company as traveling salesman in the Middle West covering twelve states (named by him) during the years 1916, 1917 and 1918; that he was formerly with the American Chickle Company in a similar capacity; that he calls on jobbers, among others, and ascertains general conditions by calling on retail stores in the states named and elsewhere to ascertain the conditions and demands for chewing gum, and has watched purchasers making purchases of gum in numerous stores throughout this territory and elsewhere and that he did the same while he was with the American Chicle Company; that the retail stores covered by him constantly were drug stores, candy stores and cigar stores and that in each instance when he went in them, he would ask the clerks how Wrigley's gum was selling or going compared with the sales of other gums, the demands for different brands of Wrigleys gum, and these retailers would tell him what the situation was; that while in the stores he observerd customers buying gum and that they would usually ask, when desiring to purchase Wrigley's gum, for "Wrigley's gum" or for the specific brand of Wrigley's gum such as "Spearmint," "Doublemint," or "Juick Fruit," and the retailer would furnish the desired gum, and when the customers desired Doublemint gum, they either called for it as "Wrigley's Doublemint gum" or "Doublemint gum"; that it is part
1587 of the witness's duty to watch the advertisements of all kinds and report as to conditions of same in each

locality, and that he called on hundreds of retail stores throughout his territory constantly during the period from 1916 and 1918 and in the principal places in each state that he traveled; that during his entire connection with the American Chicle Company and the Wm. Wrigley Jr. Company he never heard any customer ask for Larson's gum or Larson's Wintermint gum, and never saw it in any retail store that came under his observation; that he never heard of Larson or the Larson litigation until the fall of 1918 and never knew or heard of any confusion between Larson's Wintermint and Wrigley's Doublemint gum at any time.

(e) The testimony of Edward W. Eckerly "and Other Competent Witnesses Having Knowledge of the Facts," including jobbers, dealers, retailers, traveling agents, salesmen, and other persons qualified to answer, that the purchasing public, immediate, intermediate and ultimate, and become so thoroughly familiar with the name "Wrigley" in connection with the various gum products sold by it that on July 28, 1914 the names "Wm. Wrigley Jr. Co." and "Wrigley's" had become favorably and well-known in all cities, towns, villages and hamlets in the United States and in many foreign countries as a manufacturer and vendor of high grade gum of various flavors, and the public had come to know the Wm. Wrigley Jr. Company as the manufacturer and seller thereof and purchased said products because of their excellence in quality and because sold in connection with the name "Wrigley's", and because the purchasers, immediate, intermediate and ultimate, desired the Wrigely Company's products; that during the entire accounting period, dealers and consumers of Doublemint gum bought it, knowing it to have been manufactured by plaintiff and that no one was deceived as to the manufacture of the gum by the appearance of the package;

1588 (f) The testimony of Mr. Eckerly and Other Competent Witnesses having knowledge of the facts, including the officials of the Wrigley Company, jobbers, retailers, consumers, salesmen and traveling agents, and L. P. Larson Jr. (president, general manager and principal stockholder in defendant, L. P. Larson Jr. Company), and others connected with the defendant during the accounting period.

(1) That the Larson Company and its Wintermint gum were unknown in Canada and in all foreign countries and in most of the states and places in the United States where

Wrigley's Doublemint gum was sold by plaintiff, during the entire accounting period.

(2) That the selling price of Wrigley's Doublemint gum during the entire acounting period was never less, but generally more than that charged by the Larson Company for its Wintermint gum.

(3) That the Wrigley Company never diverted or attempted to divert to itself, directly or indirectly, any business of the Larson Company by palming or attempting to palm off any Doublemint gum for Larson's Wintermint gum, but the Wrigley Company at all times conspicuously and persistently by its advertising, marking of its packages and boxes and otherwise, kept constantly before the public its name "Wm. Wrigley Jr. Co." as distinguishing its chewing gum from the product of all others.

(4) That the purchasers, immediate, intermediate and ultimate, of Wrigley's Doublemint gum during the accounting period purchased it because each of them desired to purchase this product on account of his familiarity with and desire to obtain Wrigley's gum, and that all purchasers of Doublemint gum bought it knowingly and deliberately as the product of the Wrigley Company.

1589 (5) That neither said L. P. Larson, Jr. nor the Larson Company had the means, credit, facilities, knowledge, experience or ability to have sold Wintermint gum during the accounting period in any substantial portion of the territory in which the Wrigley Company sold its gum, nor could the Larson Company have filled orders for Wintermint in the quantities that the Wrigley Company sold its Doublemint gum during the accounting period, nor any substantial portion thereof, and that the Larson Company did as large a business during the accounting period as its plant, means and ability enabled it to do, and that it could not have procured supplies to have enabled it to have done more business than it did during the accounting period.

(6) Testimony showing the exact territory in which the Wrigley Company and dealers sold its Doublemint gum from time to time during the accounting period, and the exact territory in which the Larson Company did any business at any time during the accounting period, and the exact time when the Wrigley Company and dealers first commenced the sale of Wrigley's Doublemint gum in each place and the extent of such sale in each place, and the exact time when the Larson Company and dealers first sold Larson's Wintermint gum

in each place and the extent of such sales of Wintermint gum in each place.

(7) That the Larson Company at no time before or during the accounting period sold or attempted to sell Wintermint gum in any substantial portion of the territory where Doublemint gum was sold and that substantially all Wrigley's Doublemint gum sold during the accounting period was sold in territory in which Larson's Wintermint gum was un-
1590 known and never had been sold, and that none of the sales of Doublemint gum was made with any intent or purpose of forestalling the Larson Company for the sale of its Wintermint gum.

(8) That most of Wrigley's Doublemint gum sold by it during the accounting period—the exact amount of which plaintiff offered to prove—was sold to ultimate consumers in places where Larson's Wintermint gum was never sold, or offered for sale, or known, or heard of by the ultimate consumer, and that such ultimate consumer bought Wrigley's Doublemint gum deliberately and for the purpose of procuring Wrigley Company's product, and that during the accounting period Wintermint gum was known only in a few places and to only a few customers (the exact conditions concerning which plaintiff offered to prove) and that ultimate consumers who bought Doublemint gum, knowing of Wintermint gum, bought Doublemint gum knowing it at the time to be Wrigley's product, and because such purchasers preferred it.

(9) That since June 15, 1915 (the date of filing the bill herein), and up the end of the accounting period (November 12, 1918) no purchasers of Wrigley's Doublemint gum, whether immediate, intermediate, or ultimate, was, when purchasing the same, in any way deceived as to the fact that the gum was Doublemint and not Wintermint, or as to the fact that it was made by the Wrigley Company, but all the purchasers bought and received the same knowing at the time that the Wrigley Company was the manufacturer thereof, and not wanting Wintermint gum.

(10) Testimony precisely the same as that offered in the last preceding clause (9) was offered covering the period beginning July 6, 1915 (the date on which the counterclaim herein was filed) and up to November 12, 1918.

1591 (11) Testimony precisely the same as that offered in the next to the last preceding clause (9) was offered covering the period from March 14, 1917, (the date on which

Judge Anderson dismissed the bill and counterclaim herein) up to November 12, 1918.

(12) That for many years next prior to the commencement of the accounting period, the Wrigley Company and its predecessors sold Spearmint gum in wrappers substantially similar to the Spearmint wrapper appearing on the face of the decree directing an accounting in this case, and that the Wrigley Company brought out its Doublemint package with a reversal of the colors of its Spearmint brand so as to retain the good will which the extensive sale (the amount of which plaintiff offered to prove) of Wrigley's Spearmint brand had created.

(g) The testimony of William H. Stanley (Secretary of the Wm. Wrigley, Jr. Company (showing that in 1917 and up to November 12, 1918 (the War period) the Wrigley Company sold $129,854.18 worth of Doublemint gum to the United States Army and Navy and the Salvation Army and similar public institutions engaged in aiding the Government in the successful prosecution of the War.

(h) The testimony of Mr. Stanley that he can inform the Master what territory was covered by Wrigley Company's advertising of any of its gums up to July 28, 1914 (beginning of accounting period) that for several years prior and up to that date the Wrigley Company advertised its Spearmint gum throughout the United States and its possessions and throughout Canada, Great Britain, Ireland, Australia,
New Zealand and the West Indies and part of South
1592 America; and his rejected evidence also showed (Wrig-
ley Exhibit 95 offered but not admitted) the extent of Wrigley Company's foreign sales from January 1, 1911 to July 28, 1914 by years and by countries.

39. The said District Court erred in not holding that Wrigley's working sheets, marked Wrigley Exhibit 109, should have been received in evidence, in as much that said working sheets, if received, would have shown that there was no basis or justification for the percentages of so-called institutional advertising used by the court in determining the amount which it allowed the plaintiff for its advertising expenses, and said working sheets also showed that the court should have allowed the Wrigley Company $2,872,844.43 for its advertising expenses.

40. The said District Court erred in holding that the Master properly rejected and refused to consider the following evidence offered by the plaintiff upon said trial before the

Master, and which, if received, would have shown the plaintiff's method of ascertaining and allocating its advertising expenses was proper and that the court erred in its allocation of advertising expenses on a sales basis and in amortizing a part of the advertising expenses and in its finding and holding that $205,079.78 of the advertising expense was institutional, viz:

(a) The testimony of the following disinterested witnesses:

W. H. McLaughlin (Advertising Manager, Walter Baker & Co. Ltd. Dorchester Mass—Chocolates and Cocoa).

W. J. Jones (Manager, Jos. Campbell & Co. Camden, N. J. —Soups and Beans)

C. F. Brown (of E. I. DuPont DeNemours & Co., Wil-1593 mington, Del.—Explosives, Paints, Chemicals, etc.)

Burton K. Woodward, (Manager, Hall Hartwell Co. Troy, N. Y.—Shirts, Collars, Underwear)

Louis Stevenson, (Advertising Manager, Landers, Frary & Clark, New Britain Conn.—Hardware, Household Utensils, etc.)

R. E. Thompson, (Advertising Manager, Larkin Company, Buffalo, N. Y.—Soaps, Perfumes, Chemicals, etc.)

A. P. Repetti, (Advertising Manager, Mennen Company, Newark, N. J.—Talcum Powders, Shaving Creams, etc.)

Chas. E. Murname, (United Drug Co., Boston, Mass—Operator of Rexall Stores)

Eben Griffiths, (Advertising Manager, Vacuum Oil Co., New York, N. Y.)

Mr. Scofield, (Treasurer) and Dr. F. H. Peck, (E. R. Squibb & Sons, New York, N. Y. (Talcum Powders, etc)

Frank W. Harwood, (Advertising Director, General Cigar Co., New York, N. Y.

Mr. L. Bruch, (Advertising Director, American Radiator Co., Buffalo, N. Y.)

N. H. Reed, (Advertising Manager, Standard Oil Co. of Indiana, Chicago, Ill—Gasoline, Oils and various Products)

Austin S. Iglehart, (Iglehart Brothers, Evansville, Ind.—Swansdown Flour)

which offered but rejected testimony of said fourteen witnesses was that each of said witnesses has had long experience in connection with extensive advertising of various products sold by his company and in accountings in connection therewith, and has been generally familiar with the methods of national and extensive advertisers of various products and the allocation of the expense thereof between various products

advertised; that it has always been the practise of said fourteen concerns to charge the entire expense of all advertising of a given product as an expense of selling such product the same as if it were the expense of salesmen, and to make charge at the time of paying the cost thereof, and that no portion thereof was or should be charged against any other product than that advertised, and no part of the expense thereof was deferred either as a good will item or a selling expense of any product other than that advertised, and that this is the only fair method of charging the expense of advertising;
1594 that the relative receipts from the sales of two or more products advertised in a given advertisement is no criterion of the amount which should be charged as an expense of selling those products because the sales, in no manner reflect the proportionate amount paid for the space occupied by the products advertised in a given advertisement, and any attempt to apportion any advertising expense on the basis of sales of the various products dealt in by the advertiser does not truly show the profits realized from the advertised articles; that each of the witnesses has examined Wrigley Company's seven books showing its advertisements, being Larson Exhibits 30 to 33, inclusive, and understands the manner in which Wrigley Company has advertised its own name, the name "Wrigley" and its various products, and is familiar with the method adopted by the Wrigley Company in allocating its advertising expenses in ascertaining its profits as reported herein (being shown on Wrigley Exhibit 65, and documents in support thereof), and that the Wrigley Company's method of allocation so used is the one generally used by manufacturers and merchants in ascertaining the profits of various products advertised by them, and that it is the fairest and most equitable method of arriving at the expense thereof as applicable to the profits of the advertised product, and that all the expense of such advertisements should be charged, as incurred, as a selling expense exclusively against the products mentioned in the advertisement on the basis of the allocation used in said Wrigley Exhibit 65, Stanley 11, and that said method should be adopted whether in an accounting between departments of any business or between various products advertised by any
1595 company, or where one is seeking to accurately ascertain the profits of a given article to be paid over to a stranger of an accounting company who has been awarded the profits by a court decree.

(b) The testimony of Wm. H. Stanley that during the accounting period there were from 100 to 125 concerns in the United States selling chewing gum in competition with the Wrigley Company, and that the Wrigley Company's sales during the entire accounting period did not exceed from 30 to 40 per cent of the entire accounting period several of those concerns were fully equipped with plant, material, experience and finances to complete with the Wrigley Company and not to drive it out of business if it had not continued its advertising and conduct of its business on the same general large scale as it in fact did.

41. The said District Court erred in not holding that the Master should have complied with plaintiff's request that the Larson Company be required by the Master to produce before him a copy of its Federal tax returns for each of the years 1914 to 1918, both inclusive.

42. The said District Court erred in not holding that the Master should have complied with plaintiff's request that the Master appoint a competent auditor at plaintiff's expense to examine the books and records of the Larson Company so as to furnish the Master all information necessary to determine how much Federal income and excess profits tax the Larson Company would have had to pay on the profits it claims to be entitled to receive from the plaintiff in this accounting if such profits had been paid to the Larson Company as and when earned by the plaintiff .

1596 43. The said District Court erred in holding that the Master properly rejected and refused to consider evidence offered by the plaintiff upon said trial before the Master and which, if received, would have shown that the Larson Company would have had to pay at least sixty per cent to the Government as a corporation income and profits tax on such amounts of profits as the Larson Company claims were earned by the Wrigley Company in its Doublemint gum business during the accounting period, or an amount equal to or in excess of the amount $621,108.97) deducted by the Wrigley Company for its Federal taxes.

44. The said District Court erred in holding that the Master properly rejected and refused to consider evidence offered by the plaintiff upon said trial before the Master, and which if received, would have shown that there was a usual, customary allowance for manufacturing profits allowed to manufacturers during the accounting period and that such allowance was ten per cent of the cost of manufacturing, and

that such manufacturer's profits on the cost of manufacturing the Wrigley Doublemint gum involved in this accounting amounted to $403,693.36.

1597 45. The said District Court erred in holding that the Master rejected and refused to consider the following evidence offered by the plaintiff upon said trial before the Master, and which, if received, would have shown that the plaintiff was entitled to an allowance of at least $202,078.45 because of savings of profits resulting to it from the use of its patents and patent rights in the manufacture of its Doublemint gum during the accounting period, viz;

The testimony of Nelson L. Buck, in charge of manufacturing and Vice-President of the Wm. Wrigley Jr. Company that he had, during the entire existence of the company, been familiar with the production end of the company's business that he kept very complete records showing the cost of manufacture of chewing gum; that the Wrigley Company were the owners of the Barbieri, Price and other patents on machinery used in manufacturing and wrapping chewing gum; that the machines made in accordance with such patents had a capacity many times greater than any other gum-making machine (the exact extent of the increase being shown on the rejected exhibits hereinafter referred to); that with the use of said patented machinery, much manual labor (the exact amount is shown on the rejected exhibits hereinafter referred to) is saved and that less kettles and equipment and less investments are needed (the exact amount of which is shown on the rejected exhibits hereinafter referred to); that much saving in power is effected; that machines constructed in accordance with said patents automatically brush off sugar and automatically trim and leave each sheet of chewing gum on trays as distinguished from the old method of performing the same functions by manual labor; that the old method of manually transferring the gum to a final tray and

1598 thence to the wrapping department was by the use of such patented machinery eliminated; that with the patented machines the amount of gum required to be made over amounts to less than 1% in weight of the raw material used, while with the old method the amount varied from 10 to 20% that the said patented wrapping machines increased the average production from between 900 to 1100 boxes of chewing gum to 1300 boxes per 9 hour day; that the said patented wrapping machines eliminated the use of a separate banding machine and also manual labor used in feeding the

banding machine (the exact extent of which is shown on rejected exhibits hereinafter referred to;) that the said new Price machines under said patents also produced a self-sealed package using only one counterband instead of two as required by the old method, and this new method turned out 1774-20 package boxes per 9 hour day, whereas the maximum average product of the old machines was much less, (the exact amount being shown in the rejected exhibits hereinafter referred to); that with the new Price machines one operator and one helper on a machine could produce very much in excess of the quantity of gum formerly turned out by the use of three machines and six employees, (the amount of such excess being shown in the rejected exhibits hereinafter referred to;) that in addition to the savings and labor less floor space was taken up and less power was consumed, (the extent thereof being shown on rejected exhibits hereinafter rerferred to); that the patented machines are more satisfactory because they are less noisy and less liable to injure the workman; that from June, 1911 to the end of 1918 the Wrigley Company had saved in the Chicago plant alone $993,137.66 by reason of the use of said patented machinery; that
1599 the combined savings to the expiration of the said patents based on the savings of 1918 would amount to $4,770,758.88 (Wrigley Ex. 64 Buck 14); that the savings by operating the said patented wrapping machines at the Chicago plant alone, instead of the old machines, amounted to $667,421.60 (Wrigley Ex. 64, Benington 15); that the savings on the said patented machines used for feeding at the Chicago plant alone during the accounting period amounted to $272,198.00 (Wrigley Ex. 64, Buck 17); that the savings at the Brooklyn factory during the accounting period because of the use of said patented wrapping machines was $188,476.73 and $65,650.07 on the said patented sheeting machines (Wrigley Ex. 64 Buck 21, 22); that the total savings of the said patented machines at the Brooklyn plant was $1,193,672.11 (Wrigley Ex. 64, Buck 26); that the savings accruing to Doublemint by use of the said patented wrapping machines during the accounting period amounted to $153,196.77, and that the total savings accruing to Doublemint during the accounting period on account of the use of the said patented machinery was $202,078.46 (Wrigley Ex. 64 Buck 55; Wrigley Ex. 64, Buck 1-56)

1600 46. The said District Court erred in overruling and in not allowing said plaintiff's First exception to the

Report of Master in Chancery Charles B. Morrison filed in said cause November 13, 1923, which was:

"First. That the master in said report has taken an account of all gains and profits of the Wm. Wrigley Jr. Company (sometimes herein referred to as Wrigley Company, or Wrigley) to it accruing from the manufacture and sale of its Doublemint gum from July 28, 1914, to the end of the accounting period;

Whereas he should have complied with the decree which ordered him to take an account of the gains and profits of the Wm. Wrigley Jr. Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined during the accounting period, and the master should have found—

(a) That the L. P. Larson Jr. Company (sometimes herein referred to as Larson Company, or Larson), in the accounting proceeding before the master has made no attempt to prove, nor is there any testimony to show that any gains or profits were made by the Wm. Wrigley Jr. Company in connection with its manufacture and sale of Doublemint gum during the accounting period on account of the use of the enjoined dress, or that it was impossible or impracticable to separate or apportion profits arising out of the use of this enjoined dress by the Wm. Wrigley Jr. Company from profits which arose otherwise, or from the manufacture and sale of that gum if otherwise dressed, or that any profits were diverted from the L. P. Larson Jr. Company by the Wm. Wrigley Jr. Company on account of its enjoined dress; and the master should have concluded that the burden was upon the Larson Company to make such proof before any recovery can be had herein by the Larson Company against the Wrigley Company; and the master should further have found—

(b) That the L. P. Larson Jr. Company in the accounting proceedings before the master has made no attempt to prove, nor is there any testimony to show that any sale of Wrigley's Doublemint gum during the accounting period was ever made to purchasers who were misled into buying Wrigley's Doublemint gum as and for Larson's Wintermint gum, or that there was any likelihood of any such purchasers being so misled; or that the L. P. Larson Jr. Company lost any sales or profits, or that the Wm. Wrigley Jr. Company derived any profits or gains because any purchasers, immediate, intermediate or ultimate, bought Wrigley's Doublemint gum as and for Larson's Wintermint gum; and the master should have con-

cluded that the burden was upon the Larson Company to make such proof before any recovery can be had herein by the Larson Company against the Wrigley Company; and the master should further have found—

(c) That the Wm. Wrigley Jr. Company at all times, conspicuously and consistently, by its advertising, by marking its individual sticks, packages containing five sticks, and boxes in which it shipped its Doublemint gum, with its own name, Wm. Wrigley Jr. Company, and generally with its own name as manufacturer thereof, so distinguished its Doublemint gum that all purchasers thereof could easily distinguish this product as the product of the Wm. Wrigley Jr. Company; and that there was no likelihood of any purchasers buying Wrigley's Doublemint gum so marked and advertised, as the product of the L. P. Larson Jr. Company; and that the
1601 Wm. Wrigley Jr. Company derived no gains or profits because of the enjoined dress."

47. The said District Court ererd in overruling and in not allowing said plaintiff's Second exception to said Master's Report, which was:—

"Second. That the master, in the trial of the cause refused on objection of the L. P. Larson Jr. Company, and over the exceptions of the Wm. Wrigley Jr. Company, to receive the testimony offered by the Wm. Wrigley Jr. Company to prove by competent witnesses having knowledge of the facts, and by other evidence, (and with the admission of L. P. Larson Jr. Company's counsel that each of such witnesses might be considered as present in court for this purpose), and which testimony, if received, would have proven:

(a) That none of the purchasers, immediate, intermediate or ultimate, of Wrigley's Doublemint gum in the enjoined dress during the accounting period, was misled or deceived in purchasing Wrigley's Doublemint gum, but purchased Wrigley's Doublemint gum because each of them desired and preferred this product of the Wm. Wrigley Jr. Company; and that the Wm. Wrigley Jr. Company has never palmed off, nor attempted to palm off, nor have any purchasers bought any of Wrigley's Doublemint gum as and for Larson's Wintermint gum, or any product of the L. P. Larson Jr. Company.

(b) (1) That during the entire accounting period the Larson Company and its Wintermint gum were each unknown in Canada, Australia and all countries foreign to the United

States and in most places in the United States where Wrigley's Doublemint gum was sold during said period.

(2) That the territory occupied by the Larson Company in the sale of its Wintermint gum, and that of the Wrigley Company in the sale of its Doublemint gum, was largely noncompetitive.

(3) That the selling price charged by the Wrigley Company for its Doublemint gum was never less, but generally more than the price charged by the Larson Company for its Wintermint gum.

(4) That substantially all Wrigley's Doublemint gum sold during the accounting period was in territory where Larson's Wintermint gum was unknown and had never been sold.

(5) That none of the sales by the Wrigley Company or any of its jobbers, dealers or users, was made with the intent, desire, design, or purpose of forestalling the Larson Company, or the sale of its Wintermint gum.

1602 (6) That neither L. P. Larson, Jr., nor the L. P. Larson Jr. Company had the means, credit facilities, or ability, at any time during the accounting period, to have procured supplies to do more business than they did, or to have done more business than they did, or to have sold Wintermint gum throughout any substantial portion of the territory in which the Wrigley Company sold its Doublemint gum, or to have filled orders for Wintermint gum in the quantities that the Wrigley Company sold its Doublemint gum during the accounting period.

(7) That the Larson Company made no attempt to sell its Wintermint gum previous to or during the accounting period in any substantial amount or proportion of the territory where Wrigley's Doublemint gum was sold.

(c) And also the exact territory in which the Wrigley Company, its jobbers, retailers and dealers, sold Wrigley's Doublemint gum during the accounting period, and the exact territory where the Larson Company sold its Wintermint gum, or did any other business, at all times previous to and during the accounting period, and when each of them respectively commenced the sale of its products and the exact place and extent thereof; all of which was duly excepted to by the Wrigley Company at the time, as appears of record.

(d) Whereas the master should have received and considered all said offered and rejected testimony of the Wrigley Company, and every part thereof, and have found therefrom

(1) That all of the sales of Wrigley's Doublemint gum in the enjoined dress, during the accounting period, and all profits and gains derived by it therefrom, were made because of and were due to the reputation and distinctive advertising of the Wrigley Company, its plain marking of all sticks, packages and boxes of Doublemint gum conspicuously with its own name, and in most instances with its own name as manufacturer thereof.

(2) That none of the sales of Wrigley's Doublemint gum, or profits or gains derived therefrom were in any way made or influenced by the enjoined dress, and that the Larson Company is not entitled to any of the gains or porfits of the Wrigley Company on account of its manufacture and sale of Doublemint gum in the enjoined dress.

1603 48. The said District Court erred in overruling and in not allowing said plaintiff's Third exception to said Master's Report, which was:—

"Third. (a) That the master, in the trial of the cause, refused on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and with the admission of Larson Company's counsel that each of such witnesses might be considered as present in court for this purpose) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, at any time during the accounting period after June 15, 1915, (the date the Wrigley Company filed its bill of complaint herein) was in any way misled or deceived into a belief that such gum was not the product of the Wrigley Company, or that it was the product of the Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company.

(b) That the master, in the trial of the cause, refused on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and with the admission of Larson Company's counsel, that each of such witnesses might be considered as present in court

for this purpose) and which testimony, if received, would have for this purpose) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, at any time during the accounting period after July 6, 1915 (the date on which Larson's counterclaim was filed) was in any way misled or deceived into a belief that such gum was not the product of the Wrigley Company, or that it was the product of the Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company.

(c) That the Master, in the trial of the cause, refused on objection of the Larson Company and over the exceptions of the Wrigley Company, to receive testimony offered by the Wrigley Company to prove, by competent witnesses having knowledge of the facts and by other competent evidence (and

1604 with the admission of Larson Company's counsel that each of such witnesses might be considered as present in court for this purpose) and which testimony, if received, would have proven that no purchaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum, at any time during the accounting period after March 14, 1917, (the date Judge Anderson dismissed Wrigley's bill and Larson's counterclaim) was in any way misled or deceived into a belief that such gum was not the product of the Wrigley Company, or that it was the product of the Larson Company, but that every such purchaser and consumer purchased and received the same, knowing, at the time of purchase, that it was the Wrigley Company's gum and manufactured by it, and not desiring any Wintermint gum, or any product of the Larson Company."

1605 49. The said District Court erred in overruling and in not allowing said plaintiff's Fourth exception to said Master's Report, which was that the Master erred in excluding the offered evidence referred to in said exceptions Second and Third and in his conclusion that he was precluded from receiving said evidence by the second decision of the Circuit Court of Appeals herein.

50. The said District Court erred in overruling and in not allowing the plaintiff's Fifth exception to said Master's Report, which was:—

"Fifth. That the master has in said report stated:

(a) That the bill of complaint filed herein by the Wrigley Company on June 15, 1915, alleges that confusion existed and would continue between the Wrigley Doublemint package and the Larson Wintermint package;

Whereas, the master should have found that said bill of complaint merely avers, upon information and belief, the likelihood of confusion and that the same was due to the conduct of the defendants to said bill; and the master should also have found that the answer which the Wrigley Company filed to the Larson Company's counterclaim expressly denies that any confusion has resulted between said Doublemint and Wintermint packages.

(b) The master in said report has further stated that the Larson Company, in its answer and counterclaim, prayed for an injunction and accounting;

Whereas, the master should have found that said answer and counterclaim prayed an accounting of profits only in so far as they were diverted from said Larson Company and arose out of infringing acts, and that said answer and counterclaim also prayed that said Wrigley Company account for and pay over all damages sustained by said Larson Company by reason of such infringement and unlawful acts.

(c) The Master in said report further stated that the court of Appeals, in its decision in this case, directed the entry of a decree 'granting an injunction and awarding to Larson the profits made on the Doublemint business,' and decided 'the question of the Larson Company's right to profits made in territory where competition did not exist';

Whereas, the master should have concluded that the Court of Appeals did not decide, or pass upon the question as to what, if any, profits the Larson Company is entitled to recover from the Wrigley Company, and did not make any award of any profits made on the Doublemint business.

1606 (d) The Master in said report also stated and concluded that the decree referring said cause to him 'awards to Larson all gains and profits of Wrigley accruing from the manufacture and sale of its Doublemint gum in the infringing dress,' and that 'the court directs that the profits be awarded to Larson and does not authorize any deduction to be made therefrom,' and also that 'the decree requires the master to award to Larson all profits on Doublemint sold in the infringing dress and he is not authorized to make any deduction therefrom; and the master has also stated and

concluded in said report that the Wrigley Company is forbidden by said decision of the Circuit Court of Appeals from deducting from the profits and gains, if any, accruing to the Wrigley Company from the manufacture and sale of its Doublemint gum during the accounting period, any such profits and gains, even if they resulted from causes other than the use of the enjoined dress;

Whereas, the master should have found and concluded that said decree does not make any award at all and that neither said decree nor said decision of the Court of Appeals forbids the master from making any deductions from the profits and gains of the Wrigley Company accruing from the manufacture and sale of its Doublemint gum in the infringing dress; and the master should also have found and concluded that he was directed and authorized by said decree to ascertain what portion of said gains and profits during the accounting period arose from, or was due to the use of said enjoined dress, and what portion arose from or was due to causes other than said enjoined dress; and the master should further have found and concluded that the question of whether or not any award shall be made in this case to the Larson Company has not been decided by any court and is still an open one, and that he was authorized and required by said decree to deduct from the sales gains and profits of Doublemint gum to be accounted for herein such as did not result, or arise from the use of the enjoined dress, and that the Wrigley Company, if liable at all, is liable for only such profits and gains as resulted from, or were induced by the Wrigley Company's use of the enjoined dress, and the master ought to have received the evidence offered on that subject by the Wrigley Company, and said evidence, if received, would have proven that no profits or gains were due to, or resulted from the Wrigley Company's use of the enjoined dress during the accounting period."

51. The said District Court erred in overruling and in not allowing the plaintiff's Sixth exception to said Master's 1607 Report, which was:—

"Sixth. That the master should have stated and found:

(a) That the only similarity claimed by the Larson Company to have caused confusion between Wrigley's Doublemint gum and Larson's Wintermint gum was caused by the green wrappers around the individual sticks; and

(b) That the Larson Company failed to prove and that the record fails to show that any profits or gains were de-

rived by the Wrigley Company on account of its thus wrapping its individual sticks of Doublemint gum, or from the sale thereof, and the master should have concluded that the Larson Company is therefore not entitled to any profits or gains, or to any award thereof under the decree herein."

52. The said District Court erred in overruling and not allowing the plaintiff's Seventh exception to said Master's Report, which was:—

"Seventh. The master has, in said report stated and concluded that the gains and profits accruing to the Wrigley Company, or arising from the manufacture and sale of its Doublemint gum in the enjoined dress during the accounting period, amounts to $2,860,083.66, and he has recommended that said sum, together with interest thereon at six per cent. from November 12, 1918, be decreed to be paid to the L. P. Larson Jr. Company by the Wm. Wrigley Jr. Company;

Whereas, said conclusion and recommendation is wholly unsupported by and is contrary to the evidence and the law, and the master should have found and concluded that no gains or profits have accrued or arisen to the Wrigley Company from the manufacture and sale of Doublemint gum in the enjoined dress, and that no gains or profits resulted from, or were induced by the use of the enjoined dress, and the master should have recommended the entry of a decree accordingly, and instead of the master's deducting from Doublemint's gross profits the sum of only $2,292,605.66, the master should have deducted the sum of $5,205,762.81 (this sum being the $5,223,141.11 as shown by Wrigley Exhibit 92, Benington 1, page 23, less Doublemint's proportion, $17,378.30 of additional income as shown by Wrigley Exhibit 92, Benington 21 and such sum is exclusive of Federal Income and Excess Profits Taxes amounting to $621,108.97, and exclusive also of subscriptions and donations amounting to $28,740.38."

1608 53. The said District Court erred in overruling and in not allowing the plaintiff's Eighth exception to said Master's Report, which was:

"Eighth. (Doublemint gum bearing legend that it was made by the Wm. Wrigley Jr. Company.)

That the master has, in said report, stated and concluded that he is not authorized to make any deductions from the sales of Wrigley's Doublemint gum wrapped in counterbands bearing the legend:

'Made by the Manufacturers of the famous
Wrigley's Spearmint
Wm. Wrigley Jr. Company,
Chicago New York
Toronto London."

Whereas, the master should have found and concluded

(a) That the Wrigley Company is not liable for any gains or profits to it accruing or arising from the manufacture and sale of Doublemint gum wrapped in counterbands bearing said quoted legend, and also that, as is shown by the evidence, there were no gains or profits accruing to the Wrigley Company, or arising from its manufacture and sale, during the accounting period, of its Doublemint gum enclosed in wrappers which did not bear said quoted legend.

(b) (1) That the sales, during the accounting period of Wrigley's Doublemint gum in the enjoined dress which was wrapped in counterband wrappers bearing said quoted legend, amounted to $8,639,126.45, and that the sales, during said period, of Doublemint gum in the enjoined dress which was wrapped in counterbands not containing said quoted legend, but was plainly marked with the name Wm. Wrigley Jr. Company, amounting to $278,160.45 and that the sum of these two amounts ($8,917,286.90), represented the total Doublemint gum sales during the accounting period and was accepted by the Larson Company as correct; and that the Wrigley Company made no profits or gains from said sales of said Doublemint gum amounting to $278,160.45; and

(2) that no purhaser, immediate, intermediate, or ultimate, of any of Wrigley's Doublemint gum bearing said quoted legend, could have been, or was in fact deceived into believing that said gum was not made by the Wm. Wrigley Jr. Company, or that it was made by the L. P. Larson Jr. Company; and

(3) that there were no profits or gains derived on account of the enjoined dress, as distinguished from other causes."

1609 54. The said District Court erred in overruling and in not allowing the plaintiff's Ninth exception to said master's report, which was:

"Ninth. That the master refused to sustain the following objections, and each thereof, made by the Wrigley Company at the time of filing its accounts herein (and continuously insisted upon by the Wrigley Company throughout the accounting period) viz:

(a) That the master's order is not warranted by the record, or by the decree of reference;

(b) That no sales of Doublemint were made by the Wrigley Company except under its own name as manufacturer and in boxes and wrappers plainly identifying such Doublemint as Wm. Wrigley Jr. Company's product, and that no gains or profits have accrued to the Wrigley Company by reason of this Doublemint gum having been sold in said dress, labels or wrappers, except as said dress, labels or wrappers identified said product with its name, reputation and advertisement, and which gains and profits would equally have accrued to the Wrigley Company if said Doublemint had been sold in dress, labels or wrappers corresponding in all respects (except its registered trade name Doublemint and its registered trade-mark double spear) with those used by the Wm. Wrigley Jr. Company, and identified with its reputation, when the product of the L. P. Larson Jr. Company was first placed upon the market, and for many years prior thereto;

(c) No Doublemint was sold as, or confused with the Larson Company's Wintermint, or any of its products;

(d) That so far as the Wrigley Company knows, or is able to ascertain, none of its packages of Doublemint gum was ever sold or bought as the product of the L. P. Larson Jr. Company, but was all sold and bought exclusively as the product of the Wrigley Company;

Whereas, the master should have found and concluded that the Wm. Wrigley Jr. Company should not be compelled to account to the Larson Company for any of the profits or gains of its Doublemint gum until it had shown the existence of profits or gains due to the enjoined dress, or the impossibility of segregating such profits and gains, if any, from those due to other causes."

55. The said District Court erred in overruling and in not allowing the plaintiff's exception to said Master's report, which was:

1610 "Tenth. (a) That the master has in said report compared the Wrigley Company's total sales' and its 'Doublemint sales,' and used the 'percentage of Doublemint to total sales', so ascertained, in arriving at his conclusions;

Whereas, the master should have distinguished Doublemint sales to purchasers, immediate, intermediate and ultimate, who were not deceived, from Doublemint sales, if any, resulting from purchasers accepting Wrigley's Doublemint gum as and for Larson's Wintermint gum; and the master

should also have found that there was no proof of any sales, profits or gains arising from, or due to the use of the enjoined dress; and that there was no sufficient proof to justify any award or profits or gains to the Larson Company.

(b) That the master has in said report found and stated the gross profits of the Doublemint business in the accounting period to be $5,152,689.32;

Whereas, the evidence showed and the Master should have stated and certified that in arriving at the amount of said "Gross profits' he has not taken into consideration but refused to receive evidence offered by the Wrigley Company which, if received, would have proven (1) sales of Doublemint gum, and the extent thereof, to purchasers, immediate, intermediate and ultimate, who knew they were buying products of the Wm. Wrigley Jr. Company when they were purchasing Wrigley's Doublemint gum; and, (2), sales of Doublemint gum, and the extent thereof, in territory where there was no competition or likelihood of competition between the Larson Company and the Wrigley Company; and (3), sales of Wrigley's Doublemint gum not made because of any confusion in the minds of the purchasing public of Doublemint gum with the Larson Wintermint product, or any other product of the Larson Company, and the extent thereof."

56. The said District Court erred in partially overruling (and thus deducting only $2,053,534.97 instead of $2,872,844.43 for advertising) and in not fully allowing the plaintiff's Eleventh exception to said master's report, which was:

"Eleventh. Without waiving, but specifically insisting upon each and every one of the preceding exceptions to the report of the master, and excepting to the findings of fact and conclusions of law in this report concerning the amount of gains and profits of the Wrigley Company to it accruing or arising from the manufacture and sale of its Double-
1611 mint gum in the hereinbefore enjoined dress, the Wrigley Company further excepts to the master's findings and conclusions concerning the hereinafter referred to items and matters, and for cause of exceptions says:

(a) That the master has, in said report, allowed a deduction for the Wrigley Company's advertising in connection with its sale of Doublemint gum during the accounting period, of only $996,127.45, an amount which is wholly unsupported by the testimony and was arrived at by the master by an undisclosed method; and the master refused, though requested so to do, to state or certify in his report, from what testimony

or exhibits, or how he arrived at his said findings and conclusion;

Whereas, the evidence showed and the master should have found that the Wrigley Company's advertising (as illustrated in the seven books of advertising produced before the master, Larson Exhibits 30-36, inclusive), referred to the various brands advertised, and was solely designed and intended to advertise and sell and resulted only in the sale of the products of the Wrigley Company specifically referred to or pictured in such advertisement; and that the unreputed testimony of a large number of competent, credible witnesses clearly shows that the space or prominence basis is the proper and fair method for allocating advertising in this case to arrive at the cost thereof and the amount to be deducted from Doublemint's gross profits, and is properly arrived at, by measuring each advertisement separately and using the following method of allocation, namely—

(1) Where the advertisement specifies only Doublemint, charging the entire cost thereof to Doublemint; and

(2) Where the advertisement specifies Doublemint together with one or more other brands, charging each brand named therein with the cost of the exact space occupied by that brand in the advertisement, whether by a picture of the package, or by a logotype, or by any other matter referring to the specified brand, and charging among the brands named in the advertisement the balance of the cost in the proportion which such space bears to the total space occupied by all packages, logotypes, and any other matter referring to the specified brands.

(b) That the master has in said report found and stated that it is impossible to divide advertising cost with reasonable accuracy according to the space occupied and that the name 'Wrigley's', the spears and spearmen, and the descriptive literature relating to the business are so commingled with brand advertising that an accurate devision of brand and institutional advertising cannot be made, and that unless some method can be found that enables a substantially accurate separation, the conclusion is coerced that by reason of admixture, institutional and brand advertising are inextricably commingled;

1612 Whereas, the evidence showed and the master should have found that the name 'Wrigley's,' howsoever displayed or appearing in the advertisements, the spears and spearmen, the pictures, general language and the descriptive

literature relating to the business, all draw attention to and advertise only the specific brands mentioned in such advertisements and that the sole purpose thereof is to sell the brands advertised; and the evidence further showed and the master should have found that it is possible in this case to divide the advertising cost with reasonable accuracy on the space basis, and that the Wrigley Company has, in fact, made an actual and accurate measurement of each advertisement, separately, for which it is seeking credit in this case, and that it has actually and accurately ascertained and proven, separately, the following:

(1) The entire costs of all its advertisements during the accounting period, which specified Doublemint gum only.

(2) The entire cost of the exact space occupied in each of its advertisements during the accounting period, by the Doublemint brand, whether by a picture of the package or by a logotype, or by any other matter referring to the Doublemint brand.

And the evidence showed and the master should also have found that an accurate separation of brand and institutional advertising can be and has in fact been made by the Wrigley Company; and the evidence showed and the master should also have found that the actual cost to the Wrigley Company of advertising its Doublemint gum during the accounting period amounts to $2,872,844.43, and that the Wrigley Company has accurately measured and arrived at accurate results of the cost of said advertising based upon alternative methods, as shown in Wrigley Exh. 65, Stanley 2; Wrigley Exh. 65, Stanley 16; Wrigley Exh. 65, Stanley 7; and that each of said methods shows, with reasonable and sufficient accuracy, the actual amount spent by the Wrigley Company in effecting its sale of Doublemint gum through advertising it during the accounting period.

(c) That the master has in said report stated and found that the name 'Wrigley's' was the dominating feature in all display advertising during the greater part of the accounting period, and that the general language of the advertisements referred to the name 'Wrigley's' rather than to the brands advertised;

Whereas, the evidence showed and the master should have found:

(1) That the more prominence given the name 'Wrigley's' in any advertisement referring to or picturing one or more brands, the greater is the value of such advertisement in sell-

ing the brands referred to or pictured therein; and that the general language of such advertisements refers to the brands advertised therein, and is used for the sold purpose of selling such brands and securing profit therefrom.

1613 (2) That the Wrigley Company's advertising one grand does not benefit, but rather decreases sales of a nonadvertised brand.

(3) That none of the advertising done by the Wrigley Company during the accounting period which refers to or pictures a brand, is institutional advertising, but that all such advertising was solely designed and intended to advertise and sell, and resulted only in the sale of the products of the Wrigley Company specifically referred to, or pictures in such advertisements.

(d) That the master has in said report stated and certified certain percentages of so-called institutional advertising in each class of advertising, and deducted the same from the total of each class and divided the remainder among the brands advertised on the basis of their relative sales, and treated as institutional the percentages and the amounts found and certified by him at page 17 of his report;

Whereas, there is no evidence to support said findings and conclusions, or any thereof, but the evidence showed and the master ought to have found that all the advertising which the master treated as institutional was, in fact, not institutional, but brand advertising.

(e) That the master has in said report stated and found that the advertising which he found to be institutional should be amortized, and that four years is a reasonable period for such amortization;

Whereas, the testimony conclusively shows and the master should have found (1) that all the advertising expenses incurred by the Wrigley Company during the accounting period should be charged at the time the expense is incurred, on a space or prominence basis, and that no portion thereof should be deferred, capitalized, treated as an asset, or amortized.

(2) That even if the Wrigley Company's advertising during the accounting period had any deferred value at the end of the accounting period, it would not be recoverable under the decree, and also that such value could not be measured, and that it is uncertain, indefinite and conjectural.

(3) That advertising a brand must be continued, otherwise its sales will immediately fall off and will quickly disappear.

(f) That the master has in said report found and concluded that the Wrigley Company's advertisements of Doublemint gum during the accounting period advertised the Wrigley Company's entire business or institution, as well as the Doublemint gum, and had an unexpended value at the end of the accounting period.

Whereas, there was no evidence to support such a finding, but the evidence showed and the master should have found that, if the Wrigley Company retained anything of value in connection with its business, or its Doublemint gum, or its right to use the name "Wrigley's" and the name "Doublemint", (which the Wrigley Company admittedly at all times had the right to use and in which the Larson Company had no interest) at the end of the accounting period because of the business or advertising done by it during the accounting
1614 period, or because of anything charged by it or allowed to Doublemint in this accounting, then the Doublemint gum sold by the Wrigley Company during the accounting period had an equal or greater benefit and advantage by reason of the advertising done by the Wrigley Company prior and up to the commencement of the accounting period and because of the extensive advertising of the name "Wrigley's," "Wm. Wrigley Jr. Company," and the name "Doublemint," during the accounting period, and also by reason of the plant, equipment, organization and reputation which the Wrigley Company placed at the disposal of and used in connection with the Doublemint business at the beginning of the accounting period.

(g) That the master failed and refused to conclude as a matter of law that the burden was on the Larson Company of proving that the Wrigley Company's advertising during the accounting period created a so-called institutional value, if any exists, and that the Larson Company did not sustain such burden of proof and that it should not be allowed any amount on account thereof.

(h) That the master has in said report stated and found that the contention against the sales method,—that sales do not always respond in proportion to the advertising expended and especially where a new article or brand like Doublemint is placed in the market,—could be advanced if the Wrigley Company had ceased to sell gum under the name of Doublemint at the close of the accounting period, but as it continued to use the name Doublemint, it is fair to assume from its

experience with other brands, that the returns of Doublemint will finally, fully recompense it for the advertising cost.

Whereas, the evidence shows and the master should have found and concluded:

(1) That the sales of Doublemint do not properly reflect the expense of advertising it, and that it is illogical, unfair and improper to allocate advertising expenses in this case on a sales basis.

(2) That the Wrigley Company neither had the right, nor did it continue to use the enjoined dress after the accounting period, and that therefore, when it discontinued the use thereof, the continuing value, if any, of its prior advertising of the enjoined dress was destroyed, and that the continued use of the name Doublemint after the accounting period is immaterial, as the Wrigley Company at all times had the right to use that name.

(3) That there is no evidence in the record justifying the assumption or conclusion that the returns on Doublemint will finally, fully or at all recompense the Wrigley Company for the advertising cost thereof, or that the Wrigley Company's advertising had any deferred value at the end of the accounting period that could be used in determining the profits and gains made during the accounting period.

(i) That the master has in said report stated and found that by adopting the sales method Larson has been fully
1615 compensated for any value remaining in the name Doublemint at the end of the period.

Whereas, the master should have found and concluded,

(1) That the Larson Company is not, either under the facts or under the law, entitled in this case to any compensation for the supposed value created in the name Doublemint; and that by adopting the sales method of apportioning advertising Larson will be more than fully or justly compensated and that an injustice will thereby be done the Wrigley Company.

(2) That the most suitable method to do justice between the parties with respect to advertising expense is the method of allocation shown in Wrigley Exh. 65, Stanley 11, as corrected in Wrigley Exh. 92, Benington 1, pp. 4, 23, 25, or, in the alternative to so finding, the master should have adopted either the method shown in Wrigley Exh. 65, Stanley 16, or Wrigley Exh. 65, Stanley 2, or Wrigley Exh. 65, Stanley 7.

(3) That the amount properly chargeable as a selling expense of Doublemint, in arriving at the profits and gains in

this case, as shown by the testimony to have been arrived at by actual measurements, amounted to $2,872,844.43.

(j) That the master has in said report stated and concluded that a correct or fair analysis of the Wrigley Company's display advertising, as illustrated by its seven books of advertising marked Larson Exhibits 30-36 inclusive, will result in allowing only $996,127.45 to be deducted for advertising.

Whereas, the evidence showed and the master should have found and stated that a correct and fair analysis was made and reported to the master by the Wrigley Company and that the results thereof and the total amounts chargeable to Doublemint gum for the different years of the accounting period on the several classes of advertising containing so-called institutional advertising are fully, properly and correctly shown on Wrigley Exh. 65, Stanley 1-20 both inclusive, and on Wrigley Exh. 92, Benington 1, pp. 4, 23, 25. And the master should have taken Doublemint's portion of such items to be that shown on Wrigley Exh. 65, Stanley 1-20 both inclusive, and Wrigley Exh. 92, Benington 1, pp. 4, 6, 23, 25; Wrigley Exh. 65; Stanley 1, 2, 5, 7, 11, 16.

(k) That the master has refused to receive in evidence or consider the Wrigley Company's working sheets, although they were always available to and had actually been examined and used by the Larson Company's accountants.

Whereas, the master ought to have received said working sheets in evidence and considered the same, and if he had done so, they would have proven that there is no basis or justification for the Master's percentages of institutional advertising, or for his allowance of only $996,127.45 for advertising Doublemint during the accounting period; but said working sheets would have confirmed the correctness of Wrigley Exh. 65, Stanley 11; Wrigley Exh. 92, Benington 1; Wrigley Exh. 65, Stanley 1-20, both inclusive, and would have shown that $2,872,844.43 should have been allowed by the master for said advertising expenses.

1616 (l) That the master refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence offered by the Wrigley Company of fourteen witnesses, and of each of them, to prove, and which evidence, if received, would have proven (1), that said witnesses were disinterested and familiar with and had experience in national advertising and were competent witnesses, and (2) that it is customary and proper to charge the

entire expense of advertising a given product as a selling expense at the time the same is incurred, and (3), that the allocation of such expenses on a sales basis will not truly reflect the profits derived from the advertised article, and (4), that each of said witnesses has examined Larson Exhibits 30-36, both inclusive, and is familiar with the manner in which the Wrigley Company advertised during the accounting period and allocated the expense of such advertising in arriving at Doublemint's profit shown on Wrigley Exh. 65, Stanley 11, and Wrigley Exh. 92, Benington 1, at pp. 4, 23, 25, and (5), that the method of allocation adopted in preparing said Wrigley Exh. 65, Stanley 11, is the one generally used by merchants and manufacturers in ascertaining the profits of their advertised articles, and is the fairest and most equitable method of arriving at such profits, and (6), that the entire expense of said Wrigley Company's advertisements should be charged, at the time when incurred and as a selling expense, against the products mentioned in the advertisements, on the basis used in said Wrigley Exh. 65, Stanley 11, and (7), that said method should be adopted, whether in an accounting between the departments of a business, or between various advertised products, or where one is seeking accurately to ascertain the actual profits of a given article in order that they can be paid over to an outsider who has been awarded the profits of a court decree.

(m) That the master has in said report (p. 11) found and concluded that the total amount paid out for advertising during the accounting period, exclusive of donations of money, amounts to $6,798,662.73, and that this figure is not in dispute.

Whereas, the master should have found that said sum does not include amounts which were expended by the Wrigley Company after the close of the accounting period for advertising done during the accounting period.

(n) That the master has in his report (p. 13) stated that the advertising experts who testified admit that such advertising as that placed by said Wrigley Company has an institutional value.

Whereas, the master should have found that said witnesses testified that such advertising has no institutional value, and that the cost thereof should be charged as incurred, as a selling expense, to the brands specified in the advertisements.

(o) That the master has in said report stated and concluded that whether Larson in this case should be charged

with institutional advertising is a question of law upon which the opinion of witnesses is of little, if any, value.

1617 Whereas, the matter should have concluded that what does and what does not constitute institutional advertising, or brand advertising, is a question of fact and not of law, in this case, and that the opinion of expert witnesses upon that question is of importance and of great value.

(p) That the master has in said report (p. 18) ascertained Doublemint's portion of such advertising items as are not named on page 17 of said report (with the exception of detail-men and war-tax rebate certificates) in the same way as its portion of brand advertising was ascertained by the master, —that is, on the basis of Doublemint sales to total sales of advertised brands, and the master used the amount so ascertained as a basis for his conclusion.

Whereas, the master should not have ascertained Doublemint's portion of any such advertising items on a sales basis, or used any of the amounts so ascertained as a basis for his conclusion; but the master should have adopted, as the most suitable method to do justice between the parties, the method of allocation shown in and by Wrigley Exh. 65, Stanley 11, as corrected by Wrigley Exh. 92, Benington 1, pp. 4, 23, 25, or, in the alternative, either the method shown in Wrigley Exh. 65, Stanley 2, or in Wrigley Exh. 65, Stanley 16, or in Wrigley Exh. 65, Stanley Exh. 7.

(q) That the master has in said report ("Advertising" —"Detail Men") found and stated that the duties of detail-men are general in their nature, and he has allocated the expense thereof on the basis of Doublemint to all sales.

Whereas, the master should have found that when Doublemint was introduced, their primary duties were to introduce Doublemint and nothing else, and to see that Doublemint was in the stores, and to put in the advertising matter and incidentally to check up such advertising as they might see, and he should have allowed the Wrigley Company credit for $174,028.45, the amount paid out by it for detail-men in the manner and as shown on Wrigley Exh. 65, Stanley 3, 12 and Wrigley Exh. 92, Benington 1, pp. 4, 23, 25,

(r) That the master has in said report (Advertising War Tax Rebate Certificates) arrived at the amount chargeable to Doublemint on account of War Tax Rebate Certificates, by ascertaining the number of boxes of Doublemint given in exchange therefor, multiplying that number by the manufacturing cost of the gum per box and adding the cost of freight

or postage; and the master found in his report at p. 20, that Doublemint's portion of the cost of redemption of said certificates is $92,797.21.

Whereas, the master should also have added or included Doublemint' proportion of the cost of printing the certificates themselves, and he should have found that Doublemint's portion of the cost of redemption of said certificates is
1618 $99,939.51.

(s) That the master has in said report stated that Juicy Fruit was put upon the market "as an advertised brand in the latter part of 1915," and, in determining the amount which the Master allowed for advertising Doublemint in the accounting period, he assumed that the Wrigley Company began to advertise Juicy Fruit heavily in the latter part of 1915.

Whereas, the testimony shows and the master should have found that the Wrigley Company first began to advertise Juicy Fruit in the later part of 1916 and not in 1915; and, if the master had found, as he should have done, that the Wrigley Company did not begin to advertise Juicy Fruit until the latter part of 1916, he would not have found and concluded that only $996,127.45 should be allowed the Wrigley Company for advertising its Doublemint gum during the accounting period.

(t) That the master has found and stated in said report that certain percentages of certain classes of advertising were institutional.

Whereas, there is no evidence to support any of said percentages and they were arbitrarily adopted by the master.

The master also stated and found that the balance of said classes of advertising (after deducting the amount of institutional advertising so arbitrarily ascertained as aforesaid) was brand advertising, and the master then apportioned the amount of brand advertising so ascertained, on a basis of Doublemint's sales to sales of all advertised brands, and he found that the amount of brand advertising so ascertained, which should be allowed for Doublemint during the accounting period, was $517,280.59.

And the master also found and stated in said report that "Doublemint's portion (based on ratio of Doublemint sales to total sales of advertised brands) of institutional advertising as amortized," amounted to $205,079.78 and he allowed that sum for said item.

And the master has in said report also found and stated

"Doublemint's portion (based on ratio of Doublemint sales to total sales of advertised brands) of advertising containing no institutional features," to be $107,988.63.

Whereas, there is no evidence to support any of said calculations or conclusions, and the master should not have determined the amount of institutional advertising in the manner employed by him and he should not have amortized any advertising, either over a period of four years, or at all, and he should not have used the sales basis in determining any of said items, but the evidence showed and the master should have found and concluded that all of said advertising was brand advertising excepting not more than $21,171.67, and that by actual and accurate measurements Doublemint's portion of all said advertising amounted to $2,872,844.43.

(n) That the master has in said report stated that he has prepared a table which "shows the percentages of institu-
tional arrived at for the different years on the several
1619 classes of advertising containing institutional, the total amount expended for each class and the part that has been eliminated as institutional" and that he has prepared and based his conclusions on the "Summary of Advertising" at p. 20 of the report.

Whereas, there is no evidence to support any of the percentages shown in the report at p. 17, or any of the figures shown in the report on p. 20; and the Master failed and refused to comply with the Wrigley Company's request ("Objection Exhibit A" Item 40) to state in his report from what testimony or exhibits and how he arrived at his conclusions concerning advertising, and at the percentages referred to and used by him at p. 17 of his report, and at the figures shown in the column headed "Total" next to the last column on page 17 of the report, and at the sums which he apportioned in determining the figures shown in said "Summary of Advertising" on page 20 of his report, and what were the amounts of each class of advertising which were thus apportioned."

1620 57. The said District Court erred in overruling and in not allowing the plaintiff's Twelfth exception to said Master's Report, which was:

"Twelfth. (Advertising Subscriptions.) That the Master has in said report found and stated that the Wrigley Company received advertising on programs and local trade papers, etc., for only a small portion of the items aggregating $191,267.62 expended for patriotic, benevolent, religious and

business organizations, and that the value received from an advertising point of view is small and cannot be ascertained, and that it is doubtful if those disbursements had any other effect than to help to build up a good will for the Wrigley Company, and that though they may, to some degree, have benefited sales, yet, if so, the benefit derived were not great and are incapable of ascertainment, and the Master refused to allow any deduction to be made on account of any of said expenditures.

Whereas, the evidence shows and the Master should have found that said sum of $191,267.62, and every part thereof, was paid out by the Wrigley Company during the accounting period to various associations and organizations, as reasonable, usual and proper expenses of its business, and that each of said disbursements was necessary and proper in the ordinary and usual conduct of its business and in order to advertise and also to protect the same, and to advance the interests of the Wrigley Company and to procure and maintain the good will of its patrons and of the public; and the Master should have found and concluded that $28,740.38 of said sum of $191,267.62 was properly chargeable against Doublemint."

1621 58. The said District Court erred in overruling and in not allowing the plaintiff's Thirteenth exception to said Master's Report, which was:

"Thirteenth. (Good Will"—Report, p. 48.)

(a) That the master has in said report found and concluded that the Larson Company is entitled to be compensated for the good will created by the Wrigley Company during the accounting period and for the supposed value created in the name "Doublemint," and he has compensated the Larson Company thereof, and he has adopted as a measure of such compensation, the elimination of so-called institutional advertising, the amortization thereof and the allocation of the balance of the advertising expenses on a sales basis:

Whereas, the master should have found and concluded that the order of reference does not justify or permit his making any allowance to the Larson Company for the value of any good will created by the Wrigley Company during the accounting period, or for any part of such value, or for any value created in the name "Doublemint," and that the burden of proving such good will and value is on the Larson Company, and that it has not sustained such burden, and that there is no satisfactory, reliable or sufficient proof in the record concerning such value, if any, and that the evidence

with respect to the existence of such value, if any, is wholly indefinite, uncertain and speculative, and the master should not have allowed the Larson Company anything on account of said good will.

(b) That the master refused (on objection of the Larson Company and over the exceptions of the Wrigley Company), to allow William H. Stanley to give testimony on behalf of the Wrigley Company, which, if he had been permitted to testify, would have proven that for several years next prior to July 82, 1914, the Wrigley Company advertised its Spearmint gum throughout the United States and its possessions and throughout Canada, Great Britain and Ireland, Australia, New Zealand, the West Indies and part of South America, and the extent of its foreign sales from January 1, 1911, to July 28, 1914 by years and by countries; and the master likewise refused to allow Edward W. Eckerly to give testimony on behalf of the Wrigley Company, which, if received, would have proven that the Wrigley Company, since January, 1911, manufactured and extensively sold various brands of chewing gum in every town, village and city in every state in the United States and in numerous foreign countries and at all times used, in connection therewith (except on private brands), the name "Wrigley's," or Wm. Wrigley Jr., Co.,"

or both, conspicuously on counterband wrappers con-
1622 taing five sticks of gum and on all boxes containing the gum and also in connection with its advertising of all gum:

Whereas, said rejected evidence was competent and admissible to show (1) that there was no likelihood of confusion between Wrigleys' Doublemint Gum and Larson's Wintergreen Gum inasmuch as the Larson Company and its gum were unknown in most of said territory, and also to show (2) the existence of a good will at the time Doublemint gum was first marketed, at least equal to that earned by the Wrigley Company's advertising during the accounting period.

(c) That the master (on objection of the Larson Company, and over the Wrigley Company's exceptions), refused to allow William H. Stanley to give testimony for the Wrigley Company, which, if received, would have proven the extent of the heavy competition which the Wrigley Company had during and at the end of the accounting period, and would have shown the absolute necessity of the Wrigley Company continuing its extensive advertising and other energies after the accounting period, and that there was no hold-over or deferred value.

at the end of the accounting period, in the Wrigley Company's advertising during that period, and that the master ought not to have amortized any of the advertising expenses, or allowed anything to the Larson Company on account of any good will created thereby."

1623 59. The said District Court erred in partially overruling (and thus deducting only $918,732.61 instead of $969,669.35 for overhead expenses) and in not fully allowing the plaintiff's fourteenth exception to said Master's Report, which exception to the extent overruled, was:—

"Fourteenth. (overhead Expenses)

(b) Frank F. Pulver.)

That the master has in said report found and concluded that no part of the payments made to Frank F. Pulver during the accounting period should be treated as an expense;

Whereas, the evidence showed and the master should have found that, at the time of the settlement of the infringement suit referred to by the master, said Pulver was engaged in a competing and growing gum business, and that, by the terms of said settlement agreement, said Pulver sold to the Wrigley Company his valuable business and good will thereof, and also valuable machinery, supplies, trade-marks, and trade-names, and that it was also of value to the Wrigley Company to procure said Pulver's agreement not to engage in the chewing gum business in the United States or Canada for a period of 25 years; and the master should have allowed $33,107.48 as a deduction from the Doublemint profits, arrived at by writing off $241,097 (the difference between the total amount of $250,000 paid Pulver and the amount realized from the sale by Wrigley of Pulver's tangible assets, $8,903), in equal installments commencing December 19, 1913, and ending December 31, 1918.

(c) ("Cost of Alterations of Main Office."

That the master has in said report found and concluded that the Larson Company's contention that the item of "Cost of Alterations of Main Office" should be charged off over the life of Wrigley's lease, is fair and just between the parties and he allowed only $114.19 for that item;

Whereas, the evidence showed and the master should have found that Larson's said contention is unfair and unjust and the master should have allowed the Wrigley Company credit for $118.10 for said item.

(d) ("Plans for Factory Additions.")

That the master has in said report found and concluded

that it is improbable that Doublemint would have received any material benefit during the accounting period, from the item of expense, "Plans for Factory Additions," as it is likely that such a building would have been completed before the close of the accounting period, and that it is not a proper expense but should have been charged to the cost of building;

Whereas, the evidence showed and the master should have found that said item constituted a proper item of expense, and he should have allowed the charge made therefor 1624 by the Wrigley Company.

(e) ("Advances to Chicle Growers.")

That the master has in said report found and stated that the "Advances to Chicle Growers" were not established by the Wrigley Company as losses accruing within the accounting period, and he disallowed the Wrigley Company's claim for said advances;

Whereas, the evidence showed and the master should have found that said losses were proven by the Wrigley Company to have been sustained during the accounting period, and the amount thereof should have been allowed by the master as a proper deduction from the Doublemint profits.

(f) ("Reappointment of 1918 Overhead.")

That the master has in said report (p. 82) refused to allow the Wrigley Company to deduct from the profits on Doublemin, $12,500.25 as a result of a "Reappointment of 1918 Overhead," as was sought to be done in Wrigley Exhibit 92, Benington 1, pp. 85-87;

Whereas, the evidence showed and the master should have found that said amount of $12,500.25 was a proper item to be deducted from Doublemint profits.

(g) ("Brooklyn Moving Expenses.")

That the master has in said report found and stated that the claim filed by the Wrigley Company against the United States Government in connection with the item "Brooklyn Moving Expenses" covers a part only of the claim presented here, and that no good reason is given why it should not cover the entire claim, and the master refused to allow the Wrigley Company to deduct $28,392.93 from Doublemint profits on account of said item;

Whereas, the evidence showed and the master should have found that the nature and details of the claim filed against the Government are immaterial in this case, and that a good reason has been shown why the claim against the Government did not cover the entire claim filed here, and he should

have allowed the Wrigley Company to deduct said sum of $28,392.93.

(h) ("Summary of Overhead Expenses.")

That the master has in said report prepared a "Summary of Overhead Expenses" and has allowed the Wrigley Company to deduct only $915,506.09 on account of "overhead expenses";

Whereas, the evidence shows and the master ought to have found that the Wrigley Company is entitled to deduct $969,669.35 as overhead expenses, as shown in Wrigley Exh. 92, Benington 1, pp. 4, 17, 52, 53, 54."

60. The said District Court erred in partially overruling (and thus deducting only $163,234.66 instead of $314,252.03 for contingent liability on account of unredeemed United 1625 Profit Sharing Coupons) and in not fully allowing the plaintiff's Fifteenth exception to said Master's report, which was:—

"Fifteenth. (United Profit Sharing Coupons.)

(a) That the master has in said report found and stated that owing to the difference in the commodities with which the coupons were given and in the manner and conditions under which they were issued and redeemed, the experience of one concern issuing coupons is of little value in determining what the experience of another concern would be, and that because of the confusion resulting from the manner in which the coupon business was carried on by Wrigley and the inherent uncertainty and confusion in the coupon system itself, it is impossible to fix with reasonable accuracy a percentage of issues to cover redemptions, and that any opinion in that respect is necessarily based on conjecture and that not more than 33-1/3 per cent of the coupons issued by the Wrigley Company during the accounting period will finally be presented for redemption, and the master used that percentage and allowed only $2,305,318.75 to provide for redemptions and he allowed only $98,519.06 as the amount of the contingent liability on account of the issuance of said United Profit Sharing Coupons to be deducted from the amount of Doublemint's profits.

Whereas, the evidence showed and the master should have found that the Wrigley Company proved, by competent witnesses, the experience of others issuing coupons of more or less analogous character under similar conditions and over a long period of years, and the master should have found that such testimony was material and of great value, and

that the United States Government has, for taxation purposes, permitted the Wrigley Company to set up a reserve, based on the Wrigley Company having to ultimately redeem 60 per cent of all its issued coupons, and the master should further have found and concluded that the evidence shows, with reasonable and sufficient certainty, that at least fifty per-cent ($3,457,978.14) of all the coupons issued by the Wrigley Company during the accounting period will ultimately have to be redeemed by the Wrigley Company, and that at the end of the accounting period there existed a contingent liability against the Wrigley Company, because of the coupons issued by it during the accounting period and not redeemed during the accounting period, amounting to at least $1,623,450.04 (Wrigley Exh. 92, Benington 1, P. 31, lines 3, 9), and that, of said amount, at least $314,252.03 (id. line 13) should be charged to Doublemint in this accounting, and the master should have deducted on account of said contingent liability, at least said sum of $314,252.03 instead of only $98,519.06.

1626 (b) That the master, in the trial of the cause, refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence of William H. Stanley offered by the Wrigley Company to prove, and which testimony, if received, would have proven that over half of the Wrigley Company's coupons were distributed during the accounting period in territory where there were only a third of the redemption stations, and that it did only about 45 per cent of its business in territory where there were about two-thirds of the redemption stations, and that only about forty million people lived in the places where the redemption stations were, and that over sixty-five million people (using 1920 census as basis) lived in territory where there were no redemption stations at all; that during the accounting period 19.4 per cent of the Wrigley Company's coupons were distributed in four states where there were 102 redemption stations; that 45.8 per cent of its coupons were distributed in eight states where there were a maximum of 163 premium stations, and that the remaining 54.2 per cent of its coupons were distributed in the remainder of the United States in which there were only 81 redemption stations; that 7.5 per cent of the coupons distributed during the accounting period were distributed in ten states where there were no redemption stations, and that in eighteen states, in which there were only 11 redemption stations, 15.7 per cent of the coupons were distributed, and that in eight states where there were only eleven

redemption stations 8.2 per cent of the coupons were distributed.

(c) That the master, in the trial of the cause, refused (on objection of the Larson Company and over the Wrigley Company's exceptions) to receive the evidence of additional competent witnesses offered by the Wrigley Company to prove, and which evidence if received, would have proven their experience in issuing and redeeming, over a long period of years, coupons similar to Wrigley Company's coupons and under circumstances and conditions similar to those under which the Wrigley Company's coupons were issued, and that the master erred in allowing only 33⅓ per cent instead of at least 50 per cent of the value of all coupons issued by the Wrigley Company during the accounting period as its contingent liability on account of its issuance of coupons during said period."

1627 61. The said District Court erred in overruling and in not allowing the plaintiff's Sixteenth exception to said Master's Report, which was:

Sixteenth. (Depreciation of Patents and Patent Rights.)

(a) That the master has in said report stated and found, while referring to the value of patents and patent rights owned by the Wrigley Company, that "it is not established by appraisal, by money price paid therefor, or by other competent evidence," and that the evidence regarding the value of the common stock, and all the evidence respecting the value of the patents and patent rights, is too speculative and conjectural, and that the evidence showing the valuation of patents and patent rights accepted by the Government for taxation purposes and the evidence regarding the superiority in use of and the savings from the use of the machines made under these patents and patent rights, over machinery open to the Larson Company and other manufacturers, and the rest of the testimony in the record pertinent thereto, was of insufficient significance, or certainty, to permit the master to arrive at a fair and reasonable approximation of the value of these patents and patent rights for the purpose of making deductions therefor from the so-called gross profits:

Whereas, the master should have found that the evidence, including the valuation placed on the patents and patent rights of the Wrigley Company by Nelson L. Buck and by the Government ($1,500,000); the amount of stock paid for these patents and patent rights by the Wrigley Company; the value of this stock which was used by the Wrigley Company in pay-

ment for the purchase of these patents and patent rights; and the evidence of the savings resulting from their use in the manufacture of Doublemint gum,—was not speculative and conjectural, but was certain and definite and showed that the patents and patent rights were fairly and reasonably worth at least $1,500,000, and the master should have deducted from the gross profits of Doublemint, in arriving at the net profits and gains in this accounting, the sum of $64,267.43 as depreciation of patents and patent rights during the accounting period.

(b) That the master (on objection of the Larson Company and over the Wrigley Company's exceptions) struck out and excluded the evidence of Nelson L. Buck and of other witnesses, showing the superiority and savings made in the use of the machines made under the patents and patent rights acquired by the Wrigley Company at the time of its incorporation, over machinery open to Larson and other manufacturers, and also showing the fair, reasonable value of said patents and patent rights at the time the Wrigley Company was incorporated and acquired the same, to have been at least $1,500,000; and that the master, likewise, also refused
1628 to permit the Wrigley Company to substantiate said excluded evidence by the witness, L. P. Larson Jr. president, manager and principal owner of the Larson Company.

(c) That the master refused (on objection of the Larson Company and over the exceptions of the Wrigley Company) to permit the Wrigley Company to prove the amount of dividends paid by the Wrigley Company on its common stock in 1911 (the year of its incorporation), 1912, 1913 and 1914 and the value of its common stock in 1914, 1915 and 1916, which proof, if received, would have shown the company's patents and patent rights to have been fairly and reasonably worth at least $1,500,000 at the time they were acquired by the Wrigley Company."

1629 62. The said District Court erred in partially overruling and in not fully allowing the plaintiff's Seventeenth exception to said master's report, which was:

"Seventeenth. ('Miscellaneous Income.')

That the master has in said report found and stated that profits were realized and retained by the Wrigley Company on the Doublemint business during each of the accounting periods, and that Doublemint should have credit for its share of any income from the investment of such funds, whether considered as invested in the gum business or otherwise; and

the master considered and treated the assumed accumulated Doublemint profits as Doublemint's investment in the business, and allocated the total of so-called 'Miscellaneous Income,' amounting to $349,804.89, in the proportion that the accumulated profits of Doublemint at the first of each calendar year bear to the total investment capital excluding intangibles, and the master added to the Doublemint profits the sum of $71,905.74 as 'miscellaneous income,' in his Summary of Profits,' at p. 47 of said report;

Whereas, the master ought not to have included in this accounting any portion of the item of 'Miscellaneous Income' as a gain or profit on Doublemint gum, unless interest on the Wrigley Company's invested capital be deducted from Doublemint profits; and if such deduction be made for interest on invested capital, then the master should have found that only $26,202.73, instead of $71,905.74, should be added to Doublemint profits, said sum of $26,202.73 being the proper proportion of such part of said 'Miscellaneous Income' as was derived from investments forming a part of the Wrigley Company's invested capital on which interest is allowed.

And because there was no evidence to support the master's finding that $71,905.74 should be added to Doublemint profits as "Miscellaneous Income," the master ought to have stated in his report, as he was requested to do by the Wrigley Company, in its Objection No. 63, in "Objection, Exhibit A" (1) what amounts he used for Invested Capital at the first of each calendar year during the accounting period, in making his allocation on pp. 41 and 47 of said report of "Miscellaneous Income," and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the master to enable him to arrive at the amounts of invested capital used by him in this connection; and (2) what amounts he used for "Miscellaneous Income" for each of the accounting periods in making his allocation thereof on pp. 41, 47 of said report, and how he arrived at such amounts, and on what evidence he based his calculations, and what, if any, exhibits were recast by the master to enable him to arrive at the amounts of "Miscellaneous Income" used by him in this connection."

1630 63. The said District Court erred in overruling and in not allowing the plaintiff's Eighteenth exception to said Master's Report, which was:

"Eighteenth. (Federal Taxes.)

(a) That the master has in said report found and con-

cluded that the Wrigley Company is not entitled to make any deduction on account of the federal income and excess profits taxes which it paid the United States Government for the years 1917 and 1918;

Whereas, the evidence shows that the Wrigley Company is entitled and the master should have allowed it to deduct $621,108.97 in this accounting for the federal income and excess profits taxes which it paid on account of its Doublemint profits for the year 1917 and 1918; and that if the law be otherwise, and if the Doublemint profits had been the only profits earned by the Wrigley Company in 1917 and 1918 and are so treated, then the Wrigley Company should be allowed $427,737.51 on account of said taxes; and that if the law be otherwise, then the master should have allowed the Wrigley Company, because of the payment by it of said taxes, at least the sum of $372,942.09, that being the same proportion of the total federal income and excess profits taxes paid by the Wrigley Company in 1917 and 1918, as the profits from Doublemint gum during those two years bore to the total profits of the Company in those two years.

And the master should further have found and concluded that the court has the power, if necessary, to protect the interests, if any, of the Larson Company with respect to the tentative credit of $422,223.64 which the Wrigley Company deducted from its 1919 income.

(b) That the master refused (on the Larson Company's objections and over the Wrigley Company's exceptions) to comply with the Wrigley Company's request that the Larson Company be required by the master to produce before the master a copy of its federal tax returns for the years 1914, 1915, 1916, 1917 and 1918, and for each thereof, and that the master appoint a competent auditor, at the Wrigley Company's expense, to examine the books and records of the Larson Company so as to furnish the master all information necessary to enable him and the courts to determine how much federal income and excess profits tax the Larson Company would have had to pay on the profits it claims to be entitled to receive from the Wrigley Company in this accounting, if such profits had been paid to the Larson Company as and when earned by the Wrigley Company.

(c) That the master refused, on objection of the Larson Company and over the Wrigley Company's exceptions to receive evidence which the Wrigley Company offered to intro-

duce by the witness L. P. Larson, Jr., which evidence,
1631 if received, would have proven (1), precisely what federal income and excess profits taxes the Larson Company had to pay for its 1917 and 1918 business, and, also (2), what amount it would have had to pay as an additional tax upon any further profits which it might have received in those years, and, also, (3), that said Larson Company would have had to pay at least 60 per cent on such amounts of profits as it claims were earned by the Wrigley Company from the manufacture and sale of its Doublemint gum at any time during the accounting period, and that said Larson Company would have had to pay at least as high a percentage as the Wrigley Company had to pay and at least as large an amount as the Wrigley Company deducted in its filed account for federal income and excess profits taxes.

(d) That the master found and concluded in said report that it was improper for the Wrigley Company to deduct for its federal income and excess profits taxes for the years 1917 and 1918 an amount arrived at on the theory that Doublemint profits were the last to be made and should therefore bear the highest rate of tax, and that it was later on so conceded;

Whereas, the evidence shows and the master should have found that the Wrigley Company has at all times insisted that said taxes should be allowed to it at the highest rate.

(e) That the master found and concluded at P. 43 of his report that it does not appear that when the Wrigley Company paid its taxes for 1917 or 1918, or since the decree was entered, the Wrigley Company at any time informed the Government of either the pendency of this suit, or of the terms of said decree, or took any other protecting steps in its behalf:

Whereas, the master should have found that whether or not the Wrigley Company gave any such information to the Government is immaterial in this case.

(f) That the master found and concluded at p. 43 of his report that if the Larson Company is charged in this accounting with taxes paid by Wrigley, it will be subjected to double taxation;

Whereas, the master should have found and concluded that said question is immaterial.

(g) That the master found and stated in his report that the evidence indicates that the profits of the Wrigley Company for two years will be ample to cover the amount of the profits awarded to Larson by the master;

Whereas, there was no evidence to justify said finding and the master should have so found.

(h) That the master found and concluded in his report that the facts in this case do not require a court of equity, in its discretion, to relieve against hardships from changes in the federal tax laws, and that if the Wrigley Company is entitled to relief in that connection, it must obtain it from the Government and that, if necessary, courts of equity are open for that purpose;

1632 Whereas, the master should have found that neither the evidence nor the equities of this case require the Wrigley Company to seek relief from the Government on account of the payment of its federal income and excess profits taxes for 1917 and 1918, but require, and the master should have found that the amount so paid by the Wrigley Company be allowed it as a credit in this case."

1633 64. The said District Court erred in partially overruling and in not fully allowing plaintiff's Nineteenth exception to said Master's Report, to the extent that said Court refused to allow the Wrigley Company to deduct interest on $6,000,000. paid by it for Good Will when it was incorporated, and to the extent that said Court allowed plaintiff credit for interest at only 6 instead of 7% on its investment in tangible assets and Patents and Patent Rights, and allowed plaintiff a credit of only $259,120.54 instead of $304,488.89 for interest on Doublemint's proportion of the tangible capital used by plaintiff in its business during the accounting period, and allowed plaintiff a credit of only $45,260.79 instead of $52,804.27 for interest on Doublemint's proportion of plaintiff's investment in Patents and Patent Rights.

65. The said District Court erred in overruling and in not allowing plaintiff's Twentieth exception to said Master's Report, which was:—

"Twentieth. That the master did not find that the Larson Company never used any coupons or counterband coupon wrappers, and did not conclude that the Wrigley Company should not be required to account for the gains and profits to it accruing or arising from the manufacture and sale of at least so much of its Doublemint gum sold during the accounting period as was wrapped in coupon counterbands or wrappers which were redeemed by the Wrigley Company."

66. The said District Court erred in overruling and in not allowing plaintiff's Twenty-First exception to said Master's Report, which was:

"Twenty-first. (Manufacturer's Profits.)

That the master has, in said report, failed and refused to allow the Wrigley Company credit for a manufacturer's profit, and concluded (on the Larson Company's objection and over the Wrigley Company's exceptions) evidence of the value and amount thereof.

1634 67. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-second exception to said Master's report, which was:—

"Twenty-second. (The L. P. Larson Jr. Company's Unclean Hands.)

That the master has failed to find and conclude that the Larson Company did not come into court with clean hands, and that it was therefore not entitled to recover any profits;

Whereas, the evidence shows and the master should have found and concluded that the Larson Company was guilty of such fraud and deception as to disentitle it to an award of profits in this case, because, as the evidence shows, and the master should have found,

(a) The Larson Company falsely asserted, in its application for registration in the Patent Office, of its trade-mark "Wintermint," that it began to use gum under the "Wintermint" label as early as December, 1913;

Whereas, the evidence shows and the master should have found that such statement was knowingly false, and that the Larson Company sought to conceal its falsity by pretending to have made a sale to a relative of L. P. Larson, Jr. (the principal owner, manager and in control of the Larson Company), in December, 1913, and by fraudulently altering its books of accounts and records to so show.

(b) The Larson Company sought to, and did, in fact, wilfully deceive the court in this case into erroneously believing that it had a growing and extensive business throughout the United States when the Wrigley Company first introduced its Doublemint gum;

Whereas, the evidence shows and the master should have found that the Larson Company never had but a trifling and nominal business in Wintermint gum, and that its Wintermint gum sales had practically ceased before sales of Doublemint gum were well started.

(c) The Larson Company sought to deceive the public as to its identity and as to the extent of the premises occupied by it and also falsely asserted registration of its Wintermint trade-mark long before its actual registration and also sought,

by false testimony to prevent the master from allowing the Wrigley Company credit for its contingent liability with respect to its coupons, on the basis of a fifty per cent redemption.

68. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-Third exception to said Master's report, which was:—

1635 "Twenty-third. That the master refused (on the objection of the Larson Company and over the Wrigley Company's exceptions) to allow the Wrigley Company to prove by L. P. Larson, Jr. that the Larson Company duly entered into a contract (over Larson's signature as president), with one Thomas P. Tivy, in the summer of 1914, whereby said Tivy agreed that, during the next five years he would purchase all the Larson Company's products, amounting to $89,700 during the first year of said contract and to $119,600 during the second year of said contract, and to $143,000 during the third year of said contract, and to $171,600 during the fourth year of said contract and to $205,920 during the fifth year of said contract (making a total of $729,820 for the entire five-year period), and that by said contract the Larson Company agreed not to sell, or cause to be sold any of its products without the consent of said Tivy for a period of said five years, and whereby said Tivy agreed to pay the Larson Company for its various products from $20 to $30 per case for chewing gum, each case consisting of two thousand packages of gum, and each package containing five sticks, and whereby the Larson Company retained for itself the right to sell its products during said five years only within Cook County, Illinois, and at the time of entering into said contract with said Tivy the Larson Company had outstanding a contract with one H. S. Vandervoort giving the latter the exclusive right to sell all of the Larson Company's products in Cook County, Illinois; and that said contract with Tivy further provided that on the expiration of the Larson Company's said contract with Vandervoort, the Larson Company would not thereafter, within said five years, sell any of its products anywhere, even including Cook County, Illinois."

1636 69. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-Fourth exception to said Master's report, which was:—

"Twenty-fourth. That the master concluded in said re-

port that losses sustained in previous years may not be deducted from profits made in 1917 and 1918;

Whereas, he ought to have concluded as a matter of law that such losses are deductible from such profits, and that the order of reference in this case so required."

70. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-fifth exception to said Master's report, which was:—

"Twenty-fifth. That the master, in the trial of the cause, permitted, (1) (over the exceptions of the Wrigley Company) L. P. Larson, Jr., to testify as to what occurred before Judge Carpenter on September 30, 1918, while an effort was being made to have a decree entered in this suit, and (2) likewise permitted Mrs. Lovelace to testify and received in evidence correspondence regarding the kind of decree which was to be entered herein, and (3) likewise received in evidence Larson Exhibits 1-9, both inclusive;

Whereas, the master should not have received any of said evidence inasmuch as none of it was competent, relevant or material to any matter which was referred to the master."

1637 71. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-seventh exception to said Master's Report, to the extent of paragraph (a) thereof, which was:—

"Twenty-seventh. (Compensation of Accountants.)

(a) That the Master has found and concluded in his Report that $7,359.50, the amount of Auditor James Hall's bill, should be taxed as costs in the case and be paid by the Wrigley Company, with six per cent interest from the date of filing the Master's Report.

Whereas, the evidence shows and the Master should have found and concluded that no part of said bill should be taxed as costs against, or should be paid by the Wrigley Company, but that said bill should be paid by the Larson Company, because it was incurred by and for the benefit of the Larson Company, and was unnecessarily incurred."

72. The said District Court erred in overruling and in not allowing the plaintiff's Twenty-ninth exception to said Master's report, which was:—

"Twenty-ninth. That the Master in his said Report overruled the Wrigley Company's Suggestions, Objections, Requests and Exceptions, (Objection Exhibit "A") filed with

the Master on November 1, 1923, to his draft report, and stood by his said draft report.

Whereas, the Master should have followed and complied with each and every of the suggestions and requests contained in said "Objection Exhibit A," and he should have sustained each and every of the objections contained therein."

73. The said District Court erred in overruling and in not allowing the plaintiff's Thirtieth exception to said Master's report, which was:—

"Thirtieth. That the Master, in his Report, ought to have concluded and recommended that the amounts found by him to have been paid to him and to the reporter, should be taxed against and be paid by the Larson Company."

1638 74. The said District Court erred in overruling and in not allowing the plaintiff's Thirty-First exception to said Master's report, which was:

"Thirty-first: And as a further and final exception, the Wm. Wrigley Jr. Company says that the Master in his report completely misinterpreted and misapplied the decree of reference in concluding that the Wrigley Company was required to account for all Doublemint profits regardless of whether or not they were due to the enjoined dress.

Whereas, under the evidence and the decisions of the Supreme Court of the United States the Master should have found that no award has, as yet, been made in this case by any court, and that there has been no decision of any court awarding any of the Wrigley Company's profits to the Larson Company, and the Master should also have found and concluded that, by the decree of reference, he was limited to the taking of an account of only such gains and profits, if any, as were due to the enjoined dress, and that there was not a scintilla of evidence showing that any sales, profits or gains were in any manner due to, or influenced by the enjoined dress, but, on the contrary, the Master erroneously rejected the Wrigley Company's offer to prove, by admittedly competent witnesses having knowledge of the fact, that every purchaser of Wrigley's Doublemint Gum purchased the same as and for the Wrigley Company's product and because it was made by the Wrigley Company; and the Master should have found that the Larson Company is not entitled to recover any profits or gains and he should have recommended the entry of a decree accordingly."

1639 Wherefore, said plaintiff and appellant, Wm. Wrigley, Jr. Company prays that said decree be reversed and that

the said appellant may have an adjudication and decree in its favor as herein specified.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors for said appellant, Wm. Wrigley Jr. Company.

(Endorsed) Filed Mar. 20, 1925, Charles M. Bates, Clerk.

1645 And afterwards on, to wit, the 20th day of March, 1925 this matter coming on to be heard, the following order was entered by the Court: Filed Mar. 20 1925.

1646 • • • 488 • • •

ORDER ALLOWING APPEAL OF WM. WRIGLEY JR. COMPANY, APPROVING APPEAL BOND AND ALLOWING SUPERSEDEAS.

On this day comes said plaintiff, Wm. Wrigley Jr. Company, by its solicitors, and presents and files herein its petition for appeal, together with its assignment of errors, and prays for an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the decree of said District Court entered in said cause on March 20, 1925,adjudging that said defendant recover from said plaintiff $1.384,649.48 with interests and costs, and that proper order be entered herein relating to the required security to be required of said plaintiff and that execution of said decree be stayed herein and that said appeal may operate as supersedeas and that a citation be issued as provided by law, and that a transcript of the proofs, exhibits, evidence, record and all proceedings in the case and upon which said decree was based, duly authenticated, be sent to the United States Circuit Court
1647 of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, and the Court having examined the same, it is hereby ordered that the appeal by said Wm. Wrigley Jr. Company from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, be, and the same is hereby granted and allowed; and that a certified transcript of the proofs, exhibits, evidence, record and all proceedings in the case upon which said decree was based be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit.

It is further hereby ordered that the amount of the bond on said appeal be and the same hereby is fixed in the sum of $1,750,000.00 and that upon said Wm. Wrigley Jr. Company executing an appeal bond in said penalty with good and sufficient security conditioned that said Wm. Wrigley Jr. Company will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the said appeal shall operate as a supersedeas and the execution of said decree shall be stayed; and the said Wm. Wrigley Jr. Company now presenting to the Court and filing its bond in the sum of $1,750,000.00, conditioned as aforesaid, with Wm. Wrigley Jr. as security, and said Wm. Wrigley Jr. Company having moved the court for the acceptance and approval of said bond and for a stay of the execution of said decree pending the appeal and that said appeal may operate as a supersedeas, it is hereby ordered that said bond be and it is hereby approved and marked accordingly and that said appeal operate as a supersedeas and that the execution of said decree be and the same hereby is stayed.

Enter:
March 20, 1925.
JAMES H. WILKERSON.

Filed March 20, 1925.

Filed Mar. 20, 1925.

1650 And on to wit: the 20th day of March, A. D. 1925, come the Wm. Wrigley Jr. Company, a corporation, as principal, and Wm. Wrigley Jr. as surety, and filed in the Clerk's office of said court, in said entitled cause, a certain Bond on Appeal, in words and figures following to wit:

1651 • • • 488 • • •

APPEAL BOND.

Know All Men By These Presents that we, Wm. Wrigley Jr. Company, a corporation, as principal, and Wm. Wrigley Jr., as surety, are held and firmly bound unto L. P. Larson Jr. Company, a corporation, in the full and just sum of One Million Seven Hundred and Fifty Thousand Dollars to be paid to said L. P. Larson Jr. Company its successors and assigns, to which payment, well and truly to be made, we bind ourselves, and our respective heirs, legal representatives, suc-

cessors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 20th day of March, 1925.

Whereas, on the 20th day of March, 1925, a decree was rendered against said Wm. Wrigley Jr. Company by the District Court of the United States for the Northern District of Illinois, Eastern Division, in favor of said L. P. Larson Jr. Company in a suit pending in said court between said Wm. Wrigley Jr. Company, Plaintiff and defendant to counterclaim, and said L. P. Larson Jr. Company, defendant and counterclaimant, for the sum of $1,384,649.48, together with interest thereon at the rate of Six Per Cent (6%) per
1652 annum from November 13, 1923, and costs to be taxed; and

Whereas, thereafter on the 20th day of March, 1925, the said Wm. Wrigley Jr. Company having prayed for and obtained from said District Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit and filed a copy thereof in the Clerk's office of said District Court to reverse the said decree in said suit and a citation directed to said L. P. Larson Jr. Company citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago, Illinois, within thirty (30) days from the date on which said appeal was allowed; and said Wm. Wrigley Jr. Company having also prayed and been granted a supersedeas in said case pending said appeal;

Now, the condition of the above obligation is such, that if said Wm. Wrigley Jr. Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

WM. WRIGLEY JR. COMPANY (Seal),
By J. C. Cox
Its Vice President.

(Seal)
Attest:
W. H. STANLEY,
Secretary.

WM. WRIGLEY JR.
By S. W. SCHERLY,
His attorney in fact.

Approved March 20th, 1925.

JAMES H. WILKERSON,
Judge.

Filed March 20, 1925. Charles M. Bates, Clerk.

Filed Mar. 20, 1925.

1570 And on to wit: the 20th day of March, A. D. 1925, there was filed in the Clerk's office of said court a certain Petition for Appeal, in words and figures following to wit:

1571 • • • 488 • • •

PETITION FOR APPEAL.

To the Honorable James H. Wilkerson, District Judge:

The above named L. P. Larson Jr. Company, feeling itself aggrieved in the decree rendered and entered herein on the 20th day of March, A. D. 1925, sustaining certain exceptions theretofore taken to the report of Charles B. Morrison, Master in Chancery of said Court to whom said cause had been referred under a decree entered in said cause on October 14, 1918, does hereby appeal from said decree sustaining said exceptions as stated in the decree entered on the 20th day of March, 1925, to the Circuit Court of Appeals for the Seventh Circuit, for the reasons set forth in the Assignment of Errors filed herewith; and it prays that its appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents sufficient under the rules to present the questions put in issue by such assignment of errors and upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Seventh Circuit sitting at Chicago, Illinois, under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order as to the security required of such petitioner be made.

And so your petitioner will ever pray.

L. P. Larson Jr. Company,
By L. P. Larson,
President.

Attest:

_____
Secretary.

1572

Charles H. Aldrich,
Frank F. Reed,
George I. Haight,
Solicitors for Petitioner.

Filed Mar. 20, 1925, Charles M. Bates, Clerk.

1640 And on to wit: the 20th day of March, A. D. 1925, there was filed in the Clerk's office of said court a certain Assignment of Errors, in words and figures following to wit: Filed Mar. 20, 1925.

1641 • • • 488 • • •

ASSIGNMENT OF ERRORS.

Now comes the defendant and counterclaimant in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 20th day of March, A. D. 1925.

1. The said District Court erred in holding that in so far as the master's findings depended on conflicting testimony or upon the credibility of witnesses, or so far as there was any testimony consistent with such findings, the master's report was not to be treated as unassailable but was only advisory and only presumptively correct.

2. The said District Court erred in holding that said cause was not referred to Master Charles B. Morrison by consent of the defendants.

3. The said District Court erred in holding that the rules applicable to assessing damages at law in cases of wilful conversion or determining the rights of a fraudulent grantee who has improved the property which has come into his possession, or paid liens thereon, do not apply in determining profits which are to be allowed in an equity suit as an equitable measure of compensation where the trespass upon the injured party's rights has been adjudicated to have been wilful and malicious, as no such question was submitted to
1642 said court or within its jurisdiction to determine.

4. The said District Court erred in allowing the defendant Wrigley Company interest on capital alleged to have been invested in tangible assets and used in the manufacture and sale of Doublemint gum in the infringing dress, to the amount of $259,120.54 to be deducted from the admitted and found gross profits of the Wrigley Company upon the sale of Doublemint gum in the infringing dress of $5,152,689.32.

5. The said District Court erred in allowing the Wrigley Company credit for the sum of $45,260.79 for capital alleged to have been invested by the Wrigley Company in patents

and patent rights and in stating that "the evidence as to the proper deduction from gross profits on this account is clear and involves no material conflict."

6. The said District Court erred in allowing the following items as deductible from the gross profits made by the Wrigley Company from the sale of Doublemint in its infringing dress of $5,152,689.32, viz.:

Depreciation on buildings	$2,617.52
Tax on essential oils	49.17
Salaries and expenses Brooklyn & Toronto	560.03

7. The said District Court erred in adding $64,715.60 to the amount allowed by the master for contingent liability for unredeemed United Profit Sharing coupons.

8. The said District Court erred in increasing the credit allowed the Wrigley Company by the master for advertising, by the sum of $1,057,407.52, which increase was made up of the following items:

	Master	Judge	Difference
Newspapers and Magazines			
Street Car Cards			
Bill Posting			
Walls, Bulletins and Electric Signs			
Foreign	$517,280.59	$1217640.50	$700,359.91
Mother Goose Booklets			

1643	Master	Judge	Difference
Containing no Institutional			
Sample Campaign		$308,219.51	
Advertising Material		75,271.15	
Miscellaneous Advertising	$107,988.63	68,448.49	$357,047.61
Donations of Gum		13,097.09	
Totals	$625,269.22	$1,682,676.74	$1,057,407.52

and which total increase, and each item thereof, are in violation of the terms of the decree entered in said cause under the mandate of the United States Circuit Court of Appeals and were not established from the books and accounts of the Wrigley Company and depend upon the unsubstantiated tes-

timony of the witness W. H. Stanley, who testified before the master, and whose evidence was not accepted by the said master as entitled to credence as against other facts established in the record in said cause.

9. The said District Court erred in refusing to allow the sum of $71,905.74 which the master allowed to the Larson Company as Doublemint's proportion of the income arising to the Wrigley Company from the investment of the Wrigley Company's profits including the profits on Doublemint, and in allowing only $26,202.73 thereof.

10. The said District Court erred in refusing to allow interest from the date of the end of the accounting period, viz., November 12, 1918, and restricting the allowance of interest to the date of the filing of the master's report.

11. The said District Court erred in refusing to allow the fees paid Touche, Niven & Co., Accountants, as costs in said cause.

12. The said District Court erred in refusing to hold that the Wrigley Company, defendant herein, was liable for the profits made by the Canadian Company, organized pendente lite, and which continued to use the infringing dress until and including October 19th, 1921.

1644 Wherefore, the said L. P. Larson Jr. Company prays that said decree be reversed in the respects assigned, and each of them, and that said District Court be ordered to enter a decree overruling said action and in all respects confirming the report of said Master.

CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Sols. for L. P. Larson Jr. Company.

Endorsed Filed (Mar. 20, 1925).

(Endrosed) Filed Mar. 20, 1925, Charles M. Bates, Clerk.

Entered Mar. 20, 1925.

1648 And afterwards on, to wit, the 20th day of March, 1925, this matter coming on to be heard, the following order was entered by the Court:

1649 * * * 488 * * *

Friday, March 20, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

Whereupon, the defendant, L. P. Larson Jr. Company prays an appeal from the above judgment of this court to Circuit Court of Appeals, Seventh District, which is allowed on the defendant filing its appeal bond in the penal sum of $250.00, whereupon, the defendant presents herein its Appeal Bond, which bond is approved and signed and ordered by the court to be filed by the Clerk of this Court.

Filed Mar. 20, 1925.

1653 And on to-wit: the 20th day of March, A. D. 1925, come L. P. Larson Jr. Company, a corporation, as principal, and the United States Fidelity & Guaranty Company, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond, in words and figures following to-wit:

1654 * * * 488 * * *

APPEAL BOND.

Know All Men By These Presents, That we, the L. P. Larson Jr. Company, a corporation, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the Wm. Wrigley Jr. Company, a corporation, in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to said Wm. Wrigley Jr. Company, its successors and assigns, to which payment, well and truly to be made, we bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 18th day of March, 1925.

Whereas, on the 14th day of March, 1925, a decree was rendered against said Wm. Wrigley Jr. Company by the District Court of the United States for the Northern District of Illi-

nois, Eastern Division, in favor of said L. P. Larson Jr. Company in a suit pending in said court between said Wm. Wrigley Jr. Company, plaintiff and defendant to counterclaim, and said L. P. Larson Jr. Company, defendant and counterclaimant, for the sum of One Million Three Hundred Eighty-four Thousand Six Hundred Forty-nine Dollars and forty eight cents ($1,384,649.48), together with interest thereon at the rate of six per cent (6%) per annum from November 13, 1923, and costs to be taxed; and

1655 Whereas, thereafter, on the ..... day of March, 1925, the said L. P. Larson Jr. Company prayed for and obtained from said District Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit and filed a copy thereof in the Clerk's Office, to modify the said decree in said suit, and a citation directed to the said Wm. Wrigley Jr. Company citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago, Illinois, within thirty days from the date on which said appeal was allowed;

Now, the condition of the above obligation is such that if the said L. P. Larson Jr. Company shall prosecute its said appeal to effect, and shall pay all costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

L. P. Larson Jr. Company, (Seal)
By L. P. Larson Jr.
as Pres.

Attest:
Geo. W. Clutton.
Secretary.
(Seal)

United States Fidelity & Guaranty Co.
By Frank J. Gaulter
And Edmond J. Moroney
(Seal)

Attest:
Arthur F. Evans
Approved:
James H. Wilkerson.
U. S. District Judge.

(Endorsed) Filed March 20, 1925, Charles M. Bates, Clerk.

Entered Mar. 20, 1925.

1656 And afterwards on, to wit, the 20th day of March, 1925, this matter coming on to be heard, the following order was entered by the Court:

1657 * * * 488 * * *

ORDER FIXING TIME FOR FILING PRAECIPE AND CONDENSED STATEMENT OF EVIDENCE AND PROVIDING FOR SUBMISSION OF ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS.

On the stipulation of the parties this day made in open court by their respective solicitors and it appearing to the court that it is necessary or proper that all the original exhibits filed herein should be inspected in the Circuit Court of Appeals upon the appeals this day taken herein by said Wm. Wrigley Jr. Company and said L. P. Larson Jr. Company respectively, it is hereby Ordered that all of said exhibits excepting Larson Exhibits numbered 30 to 36 respectively, both inclusive, remain on file with the Clerk of said District Court and be by him sent to the Court of Appeals upon the hearing of said appeals and that said Larson Exhibits numbered 30 to 36 respectively, both inclusive, may be retained for safekeeping in the custody of said Wm. Wrigley Jr. Company subject, however, to be produced at the request of either said Circuit Court of Appeals or said L. P. Larson Jr. Company. And it is further hereby Ordered that no exhibits need be included in the transcript of the record for either of said appeals.

1658 It is further hereby Ordered that said Wm. Wrigley Jr. Company have up to and including June 15th 1925, in which to prepare and file its praecipe and statement of, the evidence in condensed or narrative form as provided by the Rules of Practice for the Courts of Equity of the United States.

Enter:

JAMES H. WILKERSON
Judge.

March 20, 1925.
Filed Mar 20, 1925.

1659 And afterwards on, to wit, the 20th day of March, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered Mar. 20, 1925.

1660 • • • 488 • • •

Friday, March 20, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

Upon motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof, on its appeal this day allowed herein, with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, due notice hereof having been given to said L. P. Larson Jr. Company, and good cause having been shown for enlarging said time as herein ordered,

It Is Therefore Hereby Ordered that the time for docketing the case and filing the record thereof, on said appeal, with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including the Seventh day of August 1925.

1661 And afterwards on, to wit, the 14th day of April, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Apr. 14, 1925.

1662 • • • 488 • • •

Tuesday, April 14, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

On agreement of the parties to this suit now here made in open Court It Is Ordered that the time in which the defendant L. P. Larson Jr. Company is to file its record for appeal be and the same is hereby extended thirty (30) days from April 20th A. D. 1925.

Entered May 19, 1925.

1663 And afterwards on, to wit, the 19th day of May, 1925 this matter coming on to be heard, the following order was entered by the Court:

1664 * * * 488 * * *

Tuesday, May 19, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

Upon motion It Is Ordered that the motion to approve condensed statement of evidence in the appeal of L. P. Larson & Company, be and the same is hereby continued to 10:30 A. M. June 8, A. D. 1925.

Entered June 3, 1925.

1665 And afterwards on, to wit, the 3rd day of June, 1925 this matter coming on to be heard, the following order was entered by the Court:

1666 * * * 488 * * *

Wednesday, June 3, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court.

On the stipulation of the parties this day filed herein, by their respective solicitors, and it appearing to the Court that it is to the best interests of the parties and that the time of this court and also of the Circuit Court of Appeals for the Seventh Circuit will be saved, if said sipulation be approved, It Is Therefore, Hereby Ordered that said stipulation be and it hereby is approved, and that the record for the appeals allowed herein March 20, 1925, be made up accordingly.

And, It Is Further Hereby Ordered that said Wm. Wrigley Jr. Company have up to and including August 12, 1925 within which to prepare and file its praecipe and prepare and lodge in the office of the Clerk of said District Court its statement of the evidence in condensed and narrative form, instead of up to and including June 20, 1925 as heretofore ordered herein.

1667 And on to-wit: the 3rd day of June, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to-wit: Filed June 3, 1925.

1668 * * * 488 * * *

STIPULATION.

Both parties hereto having taken and been allowed separate appeals at the same time from a decree entered hereni directing said plaintiff, Wm. Wrigley Jr. Company, to pay said defendant, L. P. Larson Jr. Company, $1,384,649.48 with six per cent interest from November 13, 1923, and costs, they do hereby, with the consent of the court, stipulate as follows:

1. A single transcript of record shall be prepared in said cause which shall include any portion of the record or proceedings in said cause, or in the suit of *Wm. Wrigley Jr. Company* v. *said L. P. Larson Jr. Company, et al.*, being case No. 30563 in said court, deemed essential by either party to a decision of the questions presented by its appeal. When filed in the Circuit Court of Appeals for the Seventh Circuit, said transcript of record shall serve as the record in said court in both said appeals.

2. The evidence which either party deems essential to the decision of the questions presented by its appeal, shall be included in said record, and shall be stated in simple and condensed form, and the testimony of witnesses shall be stated in narrative form, save that, to the extent that either party desires it, the other party hereby consents that any part of the testimony shall be reproduced in the exact words of the witness. All parts of the evidence which both parties deem not essential to the decision of the questions presented by either of said appeals, shall be omitted from the record.

3. Said Wm. Wrigley Jr. Company shall have up to and including August 12, 1925, within which to prepare and file its praecipe, and prepare and lodge in the office of the clerk of said District Court its statement of the evidence in condensed and narrative form, instead of up to and including June 20, 1925, as ordered herein on March 20, 1925.

(a) Said Praecipe shall indicate the portions of the record which said Wm. Wrigley Jr. Company desires to be incorporated into said transcript of record, in addition to the praecipe of the L. P. Larson Jr. Company filed herein on May 7, 1925. Before filing its said praecipe, said Wm. Wrigley Jr.

Company shall serve a copy thereof on the solicitors of
1669 said L. P. Larson Jr. Company, and should they desire additional portions of the record incorporated into said transcript, they shall file with the Clerk of said District Court their praecipe within forty-five days after said Wm. Wrigley Jr. Company has filed its said praecipe.

(b) Said Wm. Wrigley Jr. Company shall also notify the L. P. Larson Jr. Company's solicitors of its lodgment of its said condensed statement in the office of the Clerk of said District Court, and shall name a time and place when it will ask the court, or judge to approve said statement, the time so named to be at least ten days after such notice and not more than forty-five days after such lodgment. At the expiration of the time so named, or such further time as the court or judge may allow, said condensed statement, together with any objections made or amendments proposed by either party, shall be presented to the District Court or judge for approval, and when so approved and filed, it shall serve as the condensed statement of the evidence to be used on both said appeals.

3. Any exhibits desired to be reproduced by either party shall be printed and bound by the Clerk of said Court of Appeals in a separate volume, to be known as the Book of Exhibits, properly indexed and numbered for convenient use by the court and parties.

5. The initial cost and deposits for preparing and printing said joint record and Book of Exhibits, as herein provided, shall be borne and advanced in the first instance in the proportion of 1/3 by L. P. Larson Jr. Company and 2/3 by Wm. Wrigley Jr. Company, subject, however, to such reimbursement as shall be fixed on final decree.

6. A sufficient number of copies of the record and Book of Exhibits as thus determined shall be printed by the Clerk of the Circuit Court of Appeals, so that either party desiring so to do may seek relief in the Supreme Court of the United States without the delay and expense incident to reprinting the record.

7. Both parties having already filed their appeal bonds herein, it is understood that the said District Court retains jurisdiction for the purpose of completing the record for appeal, as herein provided.

8. When the parties hereto shall have filed their respective praecipes, as hereinbefore provided, and when said condensed statement of evidence prepared by said Wm. Wrigley

Jr. Company (together with the amendments thereto, if any, made by either party, as aforesaid,) shall have been approved by said District Court or judge, the L. P. Larson Jr. Company shall have leave to and shall withdraw its condensed statement of record filed by it herein on May 7, 1925, and the Wm. Wrigley Jr. Company shall have leave to and shall withdraw its praecipe filed herein on May 18, 1925.

9. It is agreed that the time for filing the record on said appeals with the Clerk of said Court of Appeals shall be extended up to and including September 28, 1925.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors for said Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Solicitors for said L. P. Larson Jr. Co.

Approved June 3rd, 1925.

JAMES H. WILKERSON,
Judge, United States District Court.

(Endorsed) Filed Jun 3, 1925, Charles M. Bates, Clerk.

1670 And afterwards on, to wit, the 3rd day of June, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered June 3, 1925.

1671 • • • 488 • • •

Wednesday, June 3, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court:

On the stipulation of the parties this day filed herein by their respective solicitors, and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeal, heretofore allowed herein, with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation as herein ordered,

It Is, Therefore, Hereby Ordered that the time for docketing the case and filing the record thereof, on said appeal, with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including September 28, 1925.

Filed Aug. 10, 1925.

1672 And on to-wit: the 10th day of August, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to-wit:

1673 * * * 488 * * *

STIPULATION.

It is hereby stipulated, subject to the approval of the Court, by and between the parties hereto, through their respective counsel, that said Wm. Wrigley Jr. Company shall have up to and including September 1, 1925 within which to prepare and file its praecipe and prepare and lodge in the office of the Clerk of the District Court its statement of the evidence in condensed and narrative form instead of up to and including August 12, 1925 as previously ordered.

It is further stipulated and agreed that the time for filing the record on said appeal with the Clerk of the Court of Appeals shall be extended up to and including October 20, 1925.

The other provisions of the stipulation entered and approved June 3, 1925, to remain in full force and effect.

ISAAC H. MAYER,
Per DAVID F. ROSENTHAL,
WALLACE R. LANE,
Solicitors for said Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
Solicitor for said L. P. Larson Jr. Co.

Approved August 10th, 1925.
CARPENTER,
Judge, United States District Court.

(Endorsed) Filed Aug. 10, 1925, Charles M. Bates, Clerk.

1674 And afterwards on, to wit, the 10th day of August, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered Aug. 10, 1925.

1675 * * * 488 * * *

August 10th, 1925.

George A. Carpenter, District Judge.

ORDER ENLARGING TIME FOR FILING PRAECIPE AND CONDENSED STATEMENT OF EVIDENCE.

On the stipulation of the parties this day filed herein, by their respective solicitors, and it appearing to the court that it is to the best interest of the parties and that the time of this court and also of the Circuit Court of Appeals for the Seventh Circuit will be saved, if said stipulation be approved. It Is Therefore Hereby Ordered that said stipulation be and it hereby is approved, and that the record for the appeals allowed herein March 20, 1925, be made up accordingly.

And, It Is Further Hereby Ordered that said Wm. Wrigley Jr. Company have up to and including September 1, 1925, within which to prepare and file its praecipe and prepare and lodge in the office of the Clerk of said District Court its statement of the evidence in condensed and narrative form, instead of up to and including August 12, 1925.

Enter:

CARPENTER,
Judge.

August 10th, 1925.
O. K.
CHARLES H. ALDRICH,
of Counsel for L. P. Larson Jr. Co.

1676 And afterwards on, to wit, the 10th day of August, 1925, this matter coming on to be heard, the following order was entered by the Court:

1677 • • • 488 • • •

Entered Aug. 10, 1925.

August 10th, 1925.

George A. Carpenter, District Judge.

ORDER.

On the stipulation of the parties this day filed herein by their respective solicitors and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeals heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit and good cause having been shown for enlarging said time as provided in said stipulation and as herein ordered, It Is Therefore Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including October 20, 1925.

Enter:

CARPENTER,
Judge.

August 10th 1925.
O. K.
CHARLES H. ALDRICH,
Of Counsel L. P. Larson Jr. Co.

1678 And on to-wit: the 1st day of September, A. D. 1925, there was filed in the Clerk's office of said court a certain Statement in Condensed and Narrative Form of the Evidence, in words and figures following to-wit:

(See Volumes I, II, III, IV, under separate cover.)

1679 And afterwards on, to wit, the 14th day of October, 1925 this matter coming on to be heard, the following order was entered by the Court:

1680 • • • 488 • • •

Wednesday, October 14, A. D. 1925. Entered Oct. 14, 1925.

Present: Honorable James H. Wilkerson, District Judge.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEAL ALLOWED HEREIN MARCH 20, 1925 TO WM. WRIGLEY JR. COMPANY.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeal heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including Nov. 23rd, 1925.

Enter:

WILKERSON,
Judge.

October 14, 1925.

1681 And afterwards on, to wit, the 2nd day of November, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Nov. 2, 1925.

1682 • • • 488 • • •

Monday, November 2, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court:.

This day comes the complainant Wrigley Jr. Company and enters herein its motion to approve condensed statement of evidence whereupon, the defendant L. P. Larson Jr. Company enters herein their motion for leave to amend which motions are continued to November 9, A. D. 1925.

Entered Nov. 9, 1925.

1683 And afterwards on, to wit, the 9th day of November, 1925 this matter coming on to be heard, the following order was entered by the Court:

1684 • • • 488 • • •

Present: Hon. James H. Wilkerson, Judge of said Court.

On agreement of the parties to this suit now here made in open Court It Is Ordered that the plaintiff's motion to approve condensed statement of evidence and the defendant's motion to amend part of records be and the same are hereby continued to November 23, A. D. 1925.

Entered Nov. 20, 1925.

1685 And afterwards on, to wit, the 20th day of November, 1925 this matter coming on to be heard, the following order was entered by the Court:

1686 • • • 488 • • •

November 20, 1925.

James H. Wilkerson, District Judge.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEAL ALLOWED HEREIN MARCH 20, 1925 TO WM. WRIGLEY JR. COMPANY.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeal heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including December 23, 1925.

Enter:

JAMES H. WILKERSON,
Judge.

November 20, 1925.

1687 And afterwards on, to wit, the 21st day of November, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered Nov. 21, 1925.

1688 • • • 488 • • •

Saturday, November 21, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

Upon motion It Is Ordered that the motion of Wm. Wrigley Jr. Company to approve condensed statement of evidence and motion of L. P. Larson Jr. Company to amend, be and the same is hereby continued to November 30th, A. D. 1925.

1689 And afterwards on, to wit, the 30th day of November, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Nov. 30, 1925.

1690 • • • 488 • • •

Monday, November 30, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

Upon motion It Is Ordered that the motion of Wm. Wrigley Jr. Company to approve condensed statement of evidence and motion of L. P. Larson Jr. Company to amend, be and the same is hereby continued to December 7th, A. D. 1925.

1691 And afterwards on, to wit, the 5th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Dec. 5, 1925.

1692 • • • 488 • • •

Saturday, December 5, 1925.

Present: Hon. George A. Carpenter, Judge of said Court.

This day coming on to be heard the motion of said Wm. Wrigley Jr. Company made before the undersigned on Oc-

tober 14, 1925, to approve its statement of the evidence prepared in simple, condensed and narrative form, as provided by Equity Rule 75 and lodged herein on September 1, 1925, and it appearing to the court that said motion has heretofore from time to time, by agreement of the parties and upon good cause shown, been duly continued by order of this Court in order that the parties might have a proper and reasonable opportunity to settle all the objections made thereto and all their differences concerning the same, and it now further appearing to the Court that the parties have been proceeding with diligence and that, if they be given further time as herein ordered, it is reasonable to expect that all such differences and objections can and will be adjusted and settled to the satisfaction of the parties and the court.

Now, therefore, in consideration of the premises, and the parties agreeing hereto, it is ordered that the said motion of the said Wm. Wrigley Jr. Company to approve said statement be, and the same is hereby further continued until December 21, 1925, at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard.

Entered Dec. 7, 1925.

1693 And afterwards on, to wit, the 7th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

1694 • • • 488 • • •

Monday, December 7, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

On motion It Is Ordered that the motion of Wrigley Jr. Company to approve condensed statement of evidence be and the same is hereby continued to December 21, A. D. 1925.

1695 And afterwards on, to wit, the 18th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

1696 • • • 488 • • •

December eighteenth 1925. Entered Dec. 18, 1925.

James H. Wilkerson, District Judge.

ORDER.

On stipulation of the parties and on motion of said Wm. Wrigley Jr. Company to approve the statement of evidence prepared in simple, condensed and narrative form it is Ordered that the motion of the Wm. Wrigley Jr. Company to approve said statement be and the same is hereby further continued until December 24th 1925 at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard.

Enter:

JAMES H. WILKERSON
Judge.

December Eighteenth 1925.
O. K.
CHARLES H. ALDRICH.

1697 And afterwards on, to wit, the 18th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Dec. 18, 1925.

1698 • • • 488 • • •

Friday, December 18, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEAL.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing case and filing the record thereof on its appeal heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered

that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including January 4th, 1926.

Enter:

JAMES H. WILKERSON
Judge.

December 18th 1925.
O. K.
CHARLES H. ALDRICH.

Entered Dec. 18, 1925.

1699 And afterwards on, to wit, the 18th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

1700 * * * 488 * * *

Friday, December 18, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

On stipulation of the parties and on motion of said Wm. Wrigley Jr. Company to approve the statement of evidence prepared in simple, condensed and narrative form It Is Ordered that the motion of the Wm. Wrigley Jr. Company to approve said statement be and the same is hereby further continued until December 24, 1925 at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard.

1701 And afterwards on, to wit, the 18th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

1702 • • • 488 • • •

December 18th 1925. Entered Dec. 18, 1925.

James H. Wilkerson, District Judge.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEAL.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing case and filing the record thereof on its appeal heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including January 4th, 1926.

Enter:

JAMES H. WILKERSON

Judge.

December 18th 1925.
O. K.
CHARLES H. ALDRICH.

1703 And afterwards on, to wit, the 21st day of December, 1925 this matter coming on to be heard, the following order was entered by the Court: Entered Dec. 21, 1925.

1704 • • • 488 • • •

Monday, December 21, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

Upon motion It Is Ordered that leave be and the same is hereby given to withdraw narrative statement filed September 1st, A. D. 1925 for the purpose of making amendments on the face thereof in accordance with the stipulation of the parties to that effect.

Entered Dec. 24, 1925.

1705 And afterwards on, to wit, the 24th day of December, 1925, this matter coming on to be heard, the following order was entered by the Court:

1706 • • • 488 • • •

December 24, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

ORDER APPROVING CONDENSED AND NARRATIVE STATEMENT.

This day coming on to be heard the motion of Wm. Wrigley Jr. Company that this Court approve its statement in condensed and narrative form, filed herein in the Clerk's office of this Court September 1, 1925, and it appearing to the Court that said statement has since been amended on the face thereof, by agreement of both parties and with the consent of the court, and that said statement, as so amended, is true, complete and properly prepared, and that the counsel for both parties do no so agree;

It Is Hereby Ordered that the said statement as so amended be and the same is hereby approved and the court does now attach its certificate of approval at the foot thereof.

Enter:

JAMES H. WILKERSON,
Judge.

Dated December 24, 1925.

Entered Dec. 30, 1925.

1707 And afterwards on, to wit, the 30th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

1708 • • • 488 • • •

Wednesday, December 30, 1925.

Present: Hon. James H. Wilkerson, Judge of said Court.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeal heretofore

allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including January 11, 1926.

1709 And afterwards on, to wit, the 8th day of January, 1926 this matter coming on to be heard, the following order was entered by the Court: Entered Jan. 8, 1926.

1710 * * * 488 * * *

Friday, January 8, 1926.

Present: Honorable James H. Wilkerson, Judge of said Court.

On stipulation of the parties and on the motion of said Wm. Wrigley Jr. Company for an extension of time for docketing the case and filing the record thereof on its appeal heretofore allowed herein with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and good cause having been shown for enlarging said time, as provided in said stipulation and as herein ordered, It Is Hereby Ordered that the time for docketing the case and filing the record thereof on said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including January twenty-first, 1926.

1711 And on to-wit: the 16th day of January, A. D. 1926, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following, to-wit:

1712 • • • 488 • • •

Filed Jan. 16, 1926.

To the Clerk of the said District Court of the United States:

Pursuant to the stipulation between the solicitors and counsel of the Wm. Wrigley Jr. Company and the solicitors and counsel for the L. P. Larson Jr. Company dated June 3, 1925, on file in this cause, we hereby withdraw the condensed statement of record filed by us on May 7, 1925, in behalf of the L. P. Larson Jr. Company in connection with its appeal herein, and we consent hereby to the withdrawal by the Wm. Wrigley Jr. Company of the praecipe filed herein by it on May 18, 1925.

You are also directed to entirely disregard and not include in the transcript of the record which you are preparing, (a), the Objections and (b), the Additional Praecipe, both of which were filed by us on or about October 10, 1925. We have, however, agreed with opposing counsel that there shall be included, and you are hereby directed to include in the transcript of record now being prepared by you, all the evidence which was before Judge Anderson, including all exhibits.

1713 We have also agreed with opposing counsel that in so far as there may be any differences between the text of any evidence before Judge Anderson so to be inserted by you in said transcript of record and the text of any reference thereto in the condensed statement of the evidence approved by Judge Wilkerson on December 24, 1925, the former shall control.

You are also directed to include in the said transcript of record a copy of this document and also copies of all orders entered in said cause since August 10, 1925.

CHARLES H. ALDRICH
GEORGE I. HAIGHT
FRANK F. REED
Solicitors and of Counsel for L. P. Larson Jr. Company.

We hereby join in and approve of the above stipulations and directions, and in connection therewith we hereby withdraw our praecipe filed May 18, 1925.

ISAAC H. MAYER
WALLACE R. LANE
Solicitors and Counsel for the Wm. Wrigley Jr. Company.

Dated January 8, 1926.

(Endorsed) Filed Jan. 16, 1926, Charles M. Bates, Clerk.

1714 And afterwards on, to wit, the 21st day of January, 1926 this matter coming on to be heard, the following order was entered by the Court: Entered Jan. 21, 1926.

1715 • • • 488 • • •

January 21, 1926.

Present: Honorable James H. Wilkerson, District Judge.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEAL ALLOWED HEREIN MARCH 20, 1925, TO L. P. LARSON JR. COMPANY.

On Stipulation of the parties and on the motion of Charles H. Aldrich, of counsel for the L. P. Larson Jr. Co., it is ordered that the extension of time within which the record in this cause shall be filed in the office of the Clerk of the United States Circuit Court of Appeals this day entered on stipulation of parties and motion of the William Wrigley Jr. Company and all former orders herein entered from time to time to enable such record to be completed, were intended to embrace also and shall be held to include the appeal of the L. P. Larson Jr. Company.

Enter:

JAMES H. WILKERSON
Judge.

January 21/26.
Approved:
ISAAC H. MAYER,
WALLACE R. LANE,
Counsel for Wm. Wrigley Jr. Co.

1716 And on to-wit: the 25th day of January, A. D. 1926, there was filed in the Clerk's office of said court a certain Stipulation and Directions, in words and figures following to-wit:

1717 • • • 488 • • •

Filed Jan. 25, 1926.

To the Clerk of the District Court of the United States:

You are directed to disregard items 37, 38, 39, 40, 41, 42 and 43 of our praecipe filed May 7, 1925, and item 20 of the praecipe of the Wm. Wrigley Jr. Company filed herein September 1, 1925, inasmuch as opposing counsel have agreed with us that the Clerk of the Court of Appeals in printing the transcript of record now being prepared by you, shall include therewith a copy of the entire record of the mandamus proceedings (No. 2822 in the said Circuit Court of Appeals).

We have also agreed with opposing counsel that in so printing said mandamus proceedings the said Clerk of the said Court of Appeals shall, by appropriate language, clearly indicate that he is inserting a copy of the said mandamus proceedings in said printed record merely for the convenience of the Court and the parties in case either of the parties or the

1718 Court should desire to refer to said mandamus record or any parts thereof and without prejudice to any objections which the said Wm. Wrigley Jr. Company may be entitled to make to any part of said mandamus record. You are also directed to include a copy of this document in the said transcript of record you are preparing.

CHARLES H. ALDRICH
GEORGE I. HAIGHT
Solicitors and of Counsel for L. P. Larson Jr. Company.

We hereby join in and approve of the above stipulations and directions.

ISAAC H. MAYER
D. B. R.
WALLACE R. LANE
Solicitors and Counsel for the Wm. Wrigley Jr. Company.

Dated, January 22, 1926.

(Endorsed) Filed Jan. 25, 1926. Charles M. Bates, Clerk.

1719 And on to-wit: the 17th day of February, A. D. 1926, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to wit:

1720 • • • 488 • • •

STIPULATION.

Filed Feb. 17, 1926.

In order to save time and expense it is stipulated by and between the parties hereto through their respective counsel that the Clerk need not make copies of the original certificate of evidence signed by the Judge who tried this cause to the Clerk of the Court of Appeals.

ISAAC H. MAYER
WALLACE R. LANE
Counsel for Wm. Wrigley Jr. Company.
CHARLES H. ALDRICH
GEORGE I. HAIGHT
Counsel for L. P. Larson Jr. Company.

Chicago, Illinois, February 17th, 1926.

(Endorsed) Filed Feb. 17, 1926. Charles M. Bates, Clerk.

1721 And on to-wit: the 22nd day of February, A. D. 1926, there was filed in the Clerk's office of said court a certain Stipulation, together with attached transcripts of proceedings before the United States Circuit Court of Appeals, in words and figures following to-wit:

Filed Feb. 22, 1926.

1722 • • • 488 • • •

STIPULATION.

To the Clerk of the District Court of the United States:

The parties hereto having previously stipulated in writing under date of January 22, 1926 that you shall disregard certain items in both the L. P. Larson Jr. Company and the Wm. Wrigley Jr. Company praecipes having reference to the mandamus record (No. 2822 in the Court of Appeals), and that the entire record in said mandamus proceedings shall be printed by the Clerk of the Court of Appeals in the transcript of record to be used on the present appeals, and it being desired to also have included in said mandamus record so to be printed the matters hereinafter specified, and all of which

were called to the attention of, and were before the District Court on the hearing of the exceptions filed by the Wm. Wrigley Jr. Company to the Master's Report, we have agreed with opposing counsel as follows:

The Clerk of said Court of Appeals shall also include in the printed transcript of record on the present appeals, (1), a copy of the printed motion filed by the L. P. Larson Jr. Company, September 28, 1921, to amend the mandate in said mandamus suit, and also a copy of the order denying
1723 said motion; and, (2), a complete stenographic copy of all the proceedings had in said Court of Appeals in open court, both on October 29, 1920 (when said mandamus proceedings were first before said court), and also on October 4, 1921 (when said motion was disposed of). Correct copies of said stenographic transcripts are hereto attached.

You are also hereby directed to include a copy of this document (including the said attached transcripts of proceedings in the Court of Appeals) in the transcript of record on the present appeals which you are now preparing.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors and of Counsel for Wm. Wrigley Jr. Company.

We hereby join in and approve of the above stipulation and directions.

CHARLES H. ALDRICH,
GEORGE I. HAIGHT,
Solicitors and of Counsel for L. P. Larson Jr. Company.

Dated, February 16th, 1926
Approved
WILKERSON,
Judge.

(Endorsed) Filed Feb. 22, 1926, Charles M. Bates, Clerk.

1917 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

Entered Oct. 4, 1921 in Court of Appeals.

For the Seventh Circuit.

Tuesday, October 4, 1921.

Court opened by proclamation of crier.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the fourth day of October 1921, of the October Term in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-sixth.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

In re Petition of L. P. Larson, Jr. Company for Writ of Mandamus

L. P. Larson Jr. Company,
2822 *vs.*
George A. Carpenter, United States District Judge, etc.

PETITION FOR A WRIT OF MANDAMUS.

Now this day come the parties by their counsel and counsel for petitioner presents the following motion:

The undersigned, counsel for the L. P. Larson Jr. Company, move the court upon the attached petition of the said company with its exhibits and affidavit of L. P. Larson, Jr. thereto, that the order heretofore entered in said cause in this

court at the present term of this court, be amended so as to
specifically adjudicate that an account of the profits of
1918 the Wm. Wrigley, Jr. Co., Limited, Canadian corporation, and of Wm. Wrigley, Jr. Company, Proprietary, Limited, Australian corporation, on Doublemint gum manufactured or sold said companies in the infringing dress, be filed by the defendant herein within a short day to be fixed by the master; and that chartered accountants selected by L. P. Larson, Jr. Co. be permitted to examine the books and papers of the said companies to ascertain the facts with reference to such manufacture and sale, with the usual power of accountants in such cases. And counsel take this occasion to express their regret that the situation makes it necessary to again trouble the court in this matter, but the conduct of opposing counsel in view of the decision of the court herein, and also in view of what was said by both this court and opposing counsel upon argument, compels us to do so if we would avoid the delays threatened and manifestly sought by opposing counsel. The court will note that the motion is of the same import as the one made originally in December, 1918; that under the master's former ruling the opposing counsel has been engaged from April 17, 1919, to January 9, 1920, in the examination of L. P. Larson Jr. in opposition to said motion, and had taken more than 1,000 pages of testimony during such examination as shown by the transcript in said cause.

That the undersigned counsel for the Larson Company finally determined to put an end to the practice of such opposing counsel, and the controversy then arose which led to the decision of this court on March 31, 1921. Neither the master nor opposing counsel seem to think anything was determined by that decision.

That the undersigned have taken down the mandate in the appeal case No. 2831 heard with the above entitled cause in this court, and filed the same in the office of the clerk of the District Court of the United States, where said cause is pending; that no mandate has been taken in the above entitled case and the same remains within the jurisdiction of this court.

That the undersigned will show that this manifest dis-
1919 regard of the decision of March 31, 1921, of this court by opposing counsel and the neglect to observe and carry out the views specifically stated by each of the judges on the argument of the said cause and in the opinions of this court,

and the professions of opposing counsel with reference to filing such an account of the doings of the said corporations, organized after the cause was at issue, to wit, in January, 1916, are a part of a conspiracy to delay and obstruct the administration of justice, the particulars of which will be later furnished to this court.

In view of the fact that the subject matter of this motion was covered by the petition for mandamus in this cause, the return of the judge to such petition, and the argument and briefs of counsel, it is not thought by the undersigned that any brief in support of this motion would be acceptable to the court.

Respectfully submitted,
CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Solicitors for L. P. Larson, Jr. Co.

And the court having heard the oral arguments of Mr. Charles H. Aldrich, counsel for petitioner in support of said motion, and of Mr. Isaac Mayer, counsel for respondent in opposition thereto, it is now here ordered that the said motion be, and the same is hereby denied.

1920 UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 3, inclusive, contain a true copy of the order entered in this court on October 4, 1921, in the case of In re Petition of L. P. Larson, Jr. Company for Writ of Mandamus, L. P. Larson Jr. Company vs. George A. Carpenter, United States District Judge, etc., No. 2822, October Term, 1921, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals

for the Seventh Circuit, at the City of Chicago, this seventeenth day of February A. D. 1926.

EDWARD M. HOLLOWAY,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*
By F. G. CAMPBELL,
Deputy Clerk.

Filed Feb. 22, 1926, Charles M. Bates, Clerk.

Entered Feb. 23, 1926.

1923 And afterwards on, to wit, the 23rd day of February, 1926, this matter coming on to be heard, the following order was entered by the Court:

1924 • • • 488 • • •

February 23, 1926.

Present: Honorable James H. Wilkerson, District Judge.

ORDER ENLARGING TIME FOR DOCKETING CASE AND FILING RECORD THEREOF ON APPEALS RESPECTIVELY ALLOWED HEREIN ON MARCH 20, 1925, to WM. WRIGLEY, JR., COMPANY AND L. P. LARSON, JR., COMPANY.

On stipulation of the parties and on their respective motions for an extention of time for docketing the case and filing the record thereof on their respective appeals heretofore allowed herein with the Clerk of the Circuit Court of Appeals for the Seventh Circuit and good cause having been shown for enlarging said time as provided in said stipulation and as herein ordered, it is hereby Ordered that the time for docketing the case and filing the record thereof on said respective appeals with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby enlarged and extended to and including February 27, 1926.

Enter: JAMES H. WILKERSON,
Judge.

February 23, 1926.
O. K.
CHARLES H. ALDRICH
OSCAR H. MAYER
WALTER R. LANE.

1939 • • • 488 • • •

PRAECIPE FOR RECORD IN THE APPEAL OF L. P. LARSON JR. COMPANY

Filed May 7, 1925.

To the Clerk of the District Court of the United States:

You are hereby requested to include in the record in the appeal of L. P. Larson Jr. Co., Defendant and Counterclaimant, the following:

1. The bill of Wm. Wrigley Jr. Company filed October 27, 1911;
2. Answer of L. P. Larson Jr. Company filed Nov. 6, 1911;
3. Amended answer of L. P. Larson Jr. Co., filed April 18, 1914;
4. The bill of the Wm. Wrigley Jr. Co., filed June 15, 1915, with Complainant's Exhibit 1 attached thereto;
5. Answer and counterclaim of L. P. Larson Jr. Company filed July 6, 1915;
6. Interrogatories filed July 27, 1915, on behalf of the L. P. Larson Jr. Company;
7. Answer to interrogatories filed August 6, 1915;
8. Objections to interrogatories filed August 6, 1915, and order overruling said objections;
9. Further answers to interrogatories filed Jan. 16, 1916;
10. Answer to defendant's counterclaim filed January 27, 1916;
11. Decree Cause 30,563 entered March 14, 1917;
12. Decree Cause 488 entered March 14, 1917;
13. Statement appeals were duly perfected by both parties to the controversies involved in these two bills and the counterclaim;
14. Stipulation filed May 10, 1917;

1940 17. The decree of October 14th, 1918;

18. The order of Master Morrison directing the Wm. Wrigley Jr. Company to file an account (Vol. 1. pp. 2-3).
19. Statements Wm. Wrigley Jr. Company
January 1, 1915, (Larson Ex. 10,) (1-192)
December 18, 1915 (Larson Ex. 11,) (1-194)
December 18, 1916 (Larson Ex. 12,) (1-196)
December 18, 1917 (Larson Ex. 13,) (1-198)
20. Mr. Patrick's statement to the Dun Mercantile Agency as to condition of the Wrigley Company (1-210)

21. Order of Master Morrison appointing James Hall court accountant under the provisions of the decree of October 14, 1918, (1-239).

22. Statement that Edward Gledhill took oath before master (1-240).

23. Records showing transfer of the Canadian business owned by the plaintiff Wrigley Company, defendant to the counterclaim, to a company organized under the laws of Canada and the distribution of the shares of common stock received in consideration of such change in form of ownership as a dividend to the shareholders of said plaintiff and counterclaim defendant (Larson Ex. 16) (1-247-269).

24. List of stockholders West Virginia Co., Canadian Company and Australian Company (Larson Ex. 18) (1, 284a, 284b and 284c) after organization of said companies.

25. Letter of July 9, 1919, addressed to Charles B. Morrison, Master in Chancery, in re Edward Gledhill, signed by Charles H. Aldrich, Frank F. Reed, (VI, 2336-2340).

26. Letter addressed to Charles B. Morrison, dated Jan. 7, 1920, signed "Isaac H. Mayer, Wallace R. Lane".

27. Motion of the L. P. Larson Jr. Co. for an order appointing Touche, Niven & So. accountants to examine the books, papers and accounts of the Wm. Wrigley Jr. Co. (VI, 2390).

28. Order making the appointment prayed for (VI, 2413).

29. Notice to the master and counsel that no further information would be furnished or testimony given because of the lack of jurisdiction on the part of the master to inquire into the business of the L. P. Larson Jr. Co. as stated upon the record by Mr. Aldrich (VI, 2381) and certificate of Master to the Court.

30. Certificate Master Morrison to District Court of questions involved.

31. The opinion of Judge Carpenter filed in the 1941 Clerk's office on March 19, 1920.

32. Order entered pursuant to said opinion March 22, 1920.

33. Petition L. P. Larson Jr. Company for appeal from said order of Judge Carpenter filed April 16, 1920.

34. Assignment of Errors filed April 16, 1920.

35. Order allowing appeal filed April 16, 1920.

36. Bond upon appeal filed and approved April 15, 1920.

43. The mandates issued in said causes.

44. The report of Master in Chancery Charles B. Morrison.
45. Objections taken by the Wrigley Company to the report of Master Morrison.
46. Exceptions taken to the Master's report in behalf of the Wm. Wrigley Jr. Company.
47. Opinion and findings of Judge Wilkerson sustaining certain exceptions and overruling others.
48. Decree entered in said cause on the 20th day of March, 1925.
49. Petition of L. P. Larson Jr. Company for allowance of appeal from last named decree.
50. Assignment of Errors in behalf of L. P. Larson Jr. Co. on said appeal filed March 20, 1925.
51. Bond for appeal and approval filed March 20, 1942 1925.
52. Citation signed by Judge Cliffe March 21, 1925.
53. Stipulation as to all exhibits and order entered by District Court thereon.
54. Order entered April 19, 1925, extending time to L. P. Larson, Jr. Company thirty days from April 20, 1925, within which to file praecipe and condensed statement of facts.
55. Praecipe.

CHARLES H. ALDRICH
FRANK F. REED
GEORGE I. HAIGHT
Solicitors L. P. Larson Jr. Co.

(Endorsed) Filed May 7, 1925.
CHARLES M. BATES, *Clerk*

1943 • • • 488 • • •

PRAECIPE OF APPELLANT, SAID WM. WRIGLEY JR. COMPANY

Filed Sept. 1, 1925.

To the Clerk of said District Court of the United States:

The said District Court having on June 3d, 1925, approved of a stipulation entered into by said parties and filed herein on said date, whereby it was stipulated that a single transcript of record shall be prepared and serve as the record in both appeals allowed to the parties herein on March 20, 1925, and said court having ordered that the record for both

said appeals be made up accordingly, you are hereby requested to incorporate the following into the transcript of the record on the said appeal of Wm. Wrigley Jr. Company, in addition to the portions of the record which you have been requested by L. P. Larson Jr. Company in its praecipe filed herein May 7, 1925, to incorporate into the transcript of
1944 the record on said appeal of of L. P. Larson Jr. Company, viz.:

1. All exhibits to the Bill of Complaint filed by said Wm. Wrigley Jr. Company in said court October 27, 1911, as case No. 30563; said exhibits to be reproduced in original colors.

2. All affidavits and exhibits thereto filed by said Wm. Wrigley Jr. Company in 1911 with, or in support of its motion for an injunction in the suit referred to in Paragraph 1 hereof.

3. All exhibits to the original answer filed on November 6, 1911, by the defendants in the suit referred to in Paragraph 1 hereof; said exhibits to be reproduced in original colors.

3a. All pleadings in suits numbered 30563 and 488 of this court.

4. (a) Notice of motion filed April 18, 1914, in the suit referred to in Paragraph 1 hereof, addressed to Offield, Towle, Graves and Offield, by Aldrich and Aldrich and Reed and Rogers, for their substitution as Solicitors for defendants, and for leave to file an amended answer and take testimony of certain named witnesses.

(b) The affidavit of Louis P. Larson Jr. sworn to on April 11, 1914, filed on April 18, 1914, in the suit referred to in paragraph 1 hereof, and referred to in said notice of motion.

5. Exhibit "2" to the amended Answer filed April 18, 1914 in said suit referred to in Paragraph 1 hereof.

5a. Notice in said suit No. 30563 addressed to Offield, Towle, Graves & Offield by Aldrich & Aldrich and Reed & Rogers that they will take depositions at the time and of the witnesses therein named, with acknowledgment of receipt of a copy of said notice on May 9, 1914, by James R. Offield.

6. All exhibits to the Bill of Complaint filed by said Wm. Wrigley Jr. Company in said court June 15, 1915, as case No. 488, other than Complainant's Exhibit "1"; said exhibits to be reproduced in original colors.

7. Exhibits "2" and "3" to L. P. Larson Jr. Company's answer and counterclaim filed in said suit No. 488 on July 6, 1915; said exhibits to be reproduced in original colors.

1945 8. All answers filed in said suit No. 488 by said Wm. Wrigley Jr. Company in January 1916 to interrogatories in addition to the answers called for in Paragraph 9 of the L. P. Larson Jr. Company's praecipe filed herein May 7, 1925.

9. Order entered by Judge Anderson March 12, 1917, that said two causes No. 30563 and No. 488 be consolidated for trial.

10. Assignment of errors filed March 26, 1917, by L. P. Larson Jr. Company in said suit No. 488.

11. Assignment of errors filed March 26, 1917, by Wm. Wrigley Jr. Company in said cause No. 30563.

12. Assignment of errors filed by Wm. Wrigley Jr. Company May 9, 1917, in said cause No. 488.

13. Order entered May 11, 1917, by Judge Anderson that the complete record shall be lodged with the Clerk of the Circuit Court of Appeals.

14. Stipulation of counsel for both parties filed May 10, 1917, that said two causes No. 30563 and No. 488—be consolidated and a joint record prepared, and that all the exhibits received in evidence upon the trial of said causes be filed with a verbatim report of the evidence received in said causes, and that said full report of the evidence be certified by Judge Anderson and be sent by the Clerk of the District Court to the Court of Appeals.

15. The mandates issued by the Seventh Circuit Court of Appeals in cases there numbered 2498 and 2500, being said causes in the District Court numbered 30563 and 488.

16. All exhibits to the decree of October 14, 1918, referring said cause to Master Morrison for an accounting; said exhibits to be reproduced in original colors.

17. (a) The Accounts filed by the Wm. Wrigley Jr. Company under Equity Rule 63 with Master Morrison on December 3, 1918, and December 10, 1918; and also the account filed by the Wm. Wrigley Jr. Company with said Master on March 6, 1919, described as an "Adjudgment of Ac-
1946 counts of Profit and Loss Statements of Wrigley's Doublemint" etc.; said three documents being described at page 57 of the Master's Report filed November 13, 1923, as having been marked "Wrigley Company's Account; Parts 1, 2 and 3".

(b) The objections of the Wm. Wrigley Jr. Company accompanying each of said three documents referred to in Clause (a) of this paragraph 16.

(c) Statement of Account of Wm. Wrigley Jr. Company, Limited, a Canadian corporation, filed with Master Morrison April 21, 1922, a copy of which was filed in your office.

Also stipulation of counsel dated Feb. 28, 1924, re use of copy of said statement of account.

(d) The objections of the Wm. Wrigley Jr. Company accompanying said last mentioned statement of account.

(e) The report of Marwick, Mitchell, Peat & Co. filed with said Master and marked "James Hall Report".

(f) The Burt & Company statement marked, "Exhibit Burt Statement".

(g) Report made by Ernest Reckitt & Company, and filed with said Master and marked, Wrigley Exhibit 92, Beington 1.

(h) Wrigley Exhibit 92, Beington 19.

(i) Wrigley Exhibit 65, Stanley 1 to 20, both inclusive.

(j) The Touche-Niven & Co. report filed with said Master and marked, Larson Exhibit 132.

(k) Wrigley Exhibit 71, Stanley 1 (8 sheets).

18. Stipulation by counsel, dated and filed July 7, 1920, in said suit No. 488, regarding L. P. Larson Jr. Company's praecipe filed April 17, 1920, and the Wm. Wrigley Jr. Company's objections and amendments filed July 7, 1920, and also providing, among other things, that the printed record in Nos. 2498 and 2500 in the Seventh Circuit Court of Appeals, and also the testimony taken and exhibits and proceedings had in the District Court in said cases and on file therein, 1947 and also in case No. 488 on reference to Master Morrison, together with all the exhibits therein referred to, shall be deemed before the Court of Appeals as physical exhibits.

19. Order (including counsel's O. K.) entered by Judge Carpenter July 7, 1920, approving the stipulation referred to in paragraph No. 18 hereof.

21. Order entered by Judge Wilkerson on March 14, 1925, directing the filing in said cause (No. 488) of all exhibits and documents referred to in said Master's report.

22. Final decree entered by Judge Wilkerson in said cause No. 488 on March 20, 1925, disposing of the Wm. Wrigley Jr. Company's exceptions and decreeing that it pay the L. P. Larson Jr. Company $1,384,649.48 with six per cent interest from November 13, 1923, and costs.

23. Wm. Wrigley Jr. Company's petition for allowance of

appeal and for supersedeas filed in said suit 488 on March 20, 1925.

24. Assignment of errors filed by Wm. Wrigley Jr. Company in said suit No. 488 on March 20, 1925.

25. Order entered by Judge Wilkerson in said suit on March 20, 1925, allowing the Wm. Wrigley Jr. Company an appeal, approving its appeal bond, and allowing the supersedeas.

26. Wm. Wrigley Jr. Company's appeal (supersedeas) bond and approval filed in said cause on March 20, 1925.

27. Order entered by Judge Wilkerson in said cause on March 20, 1925, extending to and including August 7, 1925, the time for the Wm. Wrigley Jr. Company to docket the case and file the record thereof on its said appeal, with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit,

28. Order entered by Judge Wilkerson in said cause No. 488, on March 20, 1925, that Wm. Wrigley Jr. Company 1948 have up to and including June 20, 1925, in which to prepare and file its praecipe and statement of evidence in condensed form as provided by the Equity Rules.

29. Citation issued in said suit No. 488 by Judge Wilkerson on March 20, 1925, and acceptance of service thereof by solicitors for the L. P. Larson Jr. Company.

30. Stipulation signed by counsel for both parties and filed in said suit No. 488 on June 3, 1925 (including the approval thereof by Judge Wilkerson) regarding the making up of a single record for use on the appeals by both parties from the decree of March 20, 1925.

31. Order entered by Judge Wilkerson in said cause on June 3, 1925, approving the stipulation referred to in paragraph 30 hereof, and also ordering that Wm. Wrigley Jr. Company have up to and including August 12, 1925, within which to prepare and file its praecipe and lodge its condensed statement of evidence with you.

32. Order entered by Judge Wilkerson on June 3, 1925, that the time for docketing the case and filing the record thereof on the appeal of Wm. Wrigley Jr. Company with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, be enlarged to and including September 28, 1925.

33. Stipulation signed by counsel for both parties and filed in said suit, No. 488, on August 10, 1925 (including the approval thereof by Judge Carpenter), regarding granting of

a further extension of time to the Wm. Wrigley Jr. Company, within which to prepare and file its praecipe and lodge its condensed statement of evidence with you, and to file the record on its said appeal with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

34. Order entered by Judge Carpenter in said cause on August 10, 1925, approving the stipulation referred to in paragraph 33 hereof, and also ordering that Wm. Wrigley Jr. Company have up to and including September 1, 1925 within which to prepare and file its praecipe and lodge its condensed statement of evidence with you.

35. Order entered by Judge Carpenter on August 10, 1925 that the time for docketing the case and filing the record thereof on the appeal of Wm. Wrigley Jr. Company with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, be enlarged to and including October 20, 1925.

36. Praecipe filed with you by the L. P. Larson Jr. Company on May 7, 1925.

37. The Condensed Statement of the evidence given and received on the trial of said cause and heretofore filed with you on this date and signed by the court on the.....day of....., 1925.

1949 38. A copy of this praecipe, with proof of service thereof.

You are further hereby requested to certify to the Clerk of the Circuit Court of Appeals as physical exhibits all the original exhibits which were filed herein for the consideration of the District Court on the hearing of the exceptions filed by the said Wm. Wrigley Jr. Company to the said Master's report.

ISAAC H. MAYER & DAVID F. ROSENTHAL
WALLACE R. LANE
Solicitors for Wm. Wrigley Jr. Company, Appellant.

September 1, 1925.

(Endorsed) Filed Sept. 1, A. D. 1925. Charles M. Bates, Clerk.

1950

Northern District of Illinois }
Eastern Division } ss:

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Wm. Wrigley, Jr. Company, vs. L. P. Larson, Jr. Company, In Equity, No. 488, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of February, A. D. 1926.

(Seal)

CHARLES M. BATES,
Clerk.

1951 • • • 488 • • •

CITATION.

The President of the United States—To L. P. Larson, Jr. Company:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden within thirty days of the date hereof, pursuant to a petition for appeal and order allowing the same filed in the Clerk's Office of the United States District Court in and for the Northern District of Illinois, Eastern Division thereof, wherein Wm. Wrigley Jr. Company is appellant, and L. P. Larson Jr. Company is appellee, to show cause, if any, why the decree rendered against the said Wm. Wrigley Jr. Company, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable James H. Wilkerson, Judge of
1952 the said District Court of the United States, this 20th day of March, 1925.

JAMES H. WILKERSON,
Judge.

We, the undersigned, Solicitors for the said appellee, hereby accept service of the within citation and acknowledge receipt of a true copy thereof.

Dated this 20th day of March, 1925.

CHARLES H. ALDRICH
GEORGE I. HAIGHT
FRANK F. REED
Solicitors for said Appellee.

1953 • • • 488 • • •

Endorsed: Citation. Filed Mar. 20, 1925. Charles M. Bates, Clerk.

1954 • • • • • • •

CITATION.

The President of the United States—To Wm. Wrigley Jr. Company:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden within thirty days of the date hereof, pursuant to a petition for appeal and order allowing the same filed in the Clerk's office of the United States District Court in and for the Northern District of Illinois, Eastern Division thereof, wherein the L. P. Larson Jr. Company is appellant, and the Wm. Wrigley Jr. Company is appellee, to show cause, if any, why the decree rendered against the L. P. Larson Jr. Company as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable Adam C. Cliffe, Judge of the said District Court of the United States, this 21st day of March, 1925.

ADAM C. CLIFFE,
Judge.

We, the undersigned, solicitors for the said appellee, hereby accept service of the within citation, and acknowledge receipt of a true copy thereof this 21st day of March, 1925.

ISAAC H. MAYER,
One of the Solicitors for Said Appellee.
WALLACE R. LANE.

1955 Dated this 21st day of March, 1925.

.....

.....

Solicitors for said Appellee.

1956 • • • • • • •

Endorsed: Citation to Wm. Wrigley Jr. Co. and appearance. Filed Mar. 21, 1925. Charles M. Bates, Clerk.

Filed May 12, 1926.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Wm. Wrigley Jr. Company,
vs.
L. P. Larson, Jr. Company,
Id.
ats.
Id.
} Nos. 3727-3728

STIPULATION.

Both parties being desirous to avoid duplications in the record It Is Hereby Stipulated by and between the parties through their respective counsel that the documents hereinafter set forth need not be duplicated but shall be inserted in full where they first appear and may be stricken out where they subsequently appear with an appropriate reference to the record.

Larson exhibits 10, 11, 12 and 13 should be stricken out of pages 2961-4 of the record with a statement that they appear at pages 569-571 of the record.

Larson exhibit 18 should be stricken from pages 2981-2983 and from pages 3098-3100 with the statement that they appear at pages 588-590.

Statements of counsel at page 3024 should be stricken out with reference to page 3026 where the same statements appear with additional matter.

The opinion of Judge Carpenter at pages 3060-3064 and also at pages 3073-3076 should be stricken out with the statement that it appears at pages 3032-3036.

Exhibit a at page 3049-3051 should be stricken out with the statement that it is copied at pages 515-518.

Exhibit e at pages 3064-3065 with the statement that it is copied at pages 3036-3037.

WALLACE R. LANE,
Counsel for Wm. Wrigley Jr. Co.,
CHARLES H. ALDRICH,
Of Counsel for L. P. Larson Jr. Co.,

Date:
May 11, 1926.

(Endorsed) Stipulation Filed May 12 1926 Edward M. Holloway Clerk

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Wm. Wrigley Jr. Company
vs.
L. P. Larson Jr. Company, Id.
ats.
Id.
} Nos. 3727-3728.

STIPULATION.

It Is Hereby Stipulated by and between the parties hereto that the following corrections may be made in the narrative form of evidence to be printed in the above entitled cause.

1. Insert the attached sheet marked A in lieu of the corresponding page now appearing in the narrative on file in the Clerk's office.

2. On the page at which 2108 appears, the words "of Chicago and in" should be inserted after the word "outside" in the first line.

3. Strike out the last 11 lines on the page on which 2110 appears and the first four lines on which page 2111 appears and substitute therefor the attached marked B.

4. On the page at which 1116 appears the word "don't" in the fifth line from the top should be stricken out.

WALLACE R. LANE,
Counsel for Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
Counsel for L. P. Larson Jr. Co.

June 1, 1926.

Filed Jun 2 1926 Edward M. Holloway Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 3505, inclusive, contain a true copy of the Printed Record consisting of Volumes 1 to 7 inclusive, which together with the Books of Exhibits consisting of Volumes 8 to 10 inclusive and numbered from 3507 to 4491 inclusive, were printed under my supervision and filed on July 15, 1926 and constitute the Record on which the following entitled causes were heard and determined:

No. 3727

L. P. LARSON, Jr. COMPANY

Appellant

vs.

WM. WRIGLEY, Jr. COMPANY

Appellee

No. 3728

WM. WRIGLEY, Jr. COMPANY

Appellant

vs.

L. P. LARSON, Jr. COMPANY

Appellee

October Term, 1926, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Seventeenth day of October, A. D. 1927.

EDWARD M. HOLLOWAY

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*